(12)

No. 03-923
Title: Illinois, Petitioner
v.
Roy I. Caballes
Docketed: December 30, 2003
Lower Ct: Supreme Court of Illinois
Case Nos.: (91547)
Decision Date: November 20, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 18 2003	Petition for a writ of certiorari filed. (Response due January 29, 2004)
Jan 29 2004	Brief amici curiae of The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association filed.
Feb 2 2004	Order extending time to file response to petition to and including March 1, 2004.
Mar 3 2004	Brief of respondent Roy I. Caballes in opposition filed.
Mar 16 2004	Reply of petitioner Illinois filed. (Distributed)
Mar 17 2004	DISTRIBUTED for Conference of April 2, 2004.
Apr 5 2004	Petition GRANTED.
May 18 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 29, 2004.
Jun 29 2004	Brief amicus curiae of United States filed.
Jun 29 2004	Brief of petitioner Illinois filed.
Jun 29 2004	Brief amici curiae of The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association filed.
Jun 29 2004	Brief amici curiae of Arkansas and 27 other States filed.
Jul 9 2004	Extension of time within which to file respondent's brief on the merits to and including September 7, 2004.
Aug 19 2004	CIRCULATED.
Aug 23 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 27 2004	Further extension of time within which to file respondent's brief on the merits to and including September 17, 2004.
Sep 1 2004	SET FOR ARGUMENT Wednesday, November 10, 2004.
Sep 17 2004	Brief of respondent Roy I. Caballes filed. (Distributed)
Sep 17 2004	Brief amici curiae of ACLU, et al. filed. (Distributed)
Sep 17 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Sep 27 2004	Record received from Supreme Court of Illinois. (1 box)
Sep 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 22 2004	Motion to dispense with printing the joint appendix filed by petitioner Illinois.
Oct 22 2004	Reply of petitioner Illinois filed. (Distributed)
Nov 1 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.

Nov 10 2004 Argued. For petitioner: Lisa Madigan, Attorney General, Chicago, Ill.; and for the the United States, as amicus curiae, Christopher A. Wray, Assistant Attorney General, Criminal Division, Washington, D.C. For respondent: Ralph E. Meczyk, Chicago, Ill.

Supreme Court, U.S.
FILED

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No. 03-

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROY I. CABALLES, RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App. 1a-10a) will be reported at ___ Ill.2d ___, ___ N.E.2d ___ (2003), and is reported at 2003 WL 22725527. The judgment of the Appellate Court of Illinois, Third District, is reported at 321 Ill.App.3d 1063, 797 N.E.2d 250 (2001) (Table), and its unpublished opinion is reproduced at App. 11a-19a. The oral ruling of the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois (App. 20a-27a), is unreported.

JURISDICTION

The Supreme Court of Illinois entered judgment on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a bench trial, the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, convicted respondent of one count of cannabis trafficking under 720 ILCS 550/5.1(a) (West 1998). The Illinois Appellate Court affirmed. The Illinois Supreme Court reversed, holding that the use of a drug-detection dog during a legitimate traffic stop of respondent's vehicle violated the Fourth Amendment because there were no specific, articulable facts suggesting that the vehicle contained illegal drugs.

1. On November 12, 1998, Trooper Daniel Gillette stopped respondent for speeding. Gillette radioed the police dispatcher that he was making the stop. Trooper Craig Graham, of the Illinois State Police Drug Interdiction Team, heard the radio transmission and told the dispatcher that he was going to meet Gillette and conduct a canine sniff. App. 1a.

Trooper Gillette approached respondent's car, informed respondent he was speeding, and asked for respondent's driver's license, vehicle registration and proof of insurance. Respondent complied. Gillette then instructed respondent to reposition his car on the shoulder of the road, so that both vehicles would be out of traffic, and to come back to the squad car because it was raining. Respondent again complied. *Id.* 2a.

Once both men were seated in the squad car, Trooper Gillette told respondent he was going to write a warning ticket for speeding. Gillette then called the police dispatcher to determine whether respondent's license was valid and to check for outstanding warrants. The dispatcher reported back that respondent had surrendered his Illinois license to Nevada, and two minutes later confirmed that respondent's Nevada license was valid. After receiving this confirmation, Gillette asked the dispatcher for respondent's criminal history. *Ibid.*

Trooper Gillette then asked respondent for consent to search his vehicle, and respondent refused. Gillette next asked respondent if he had ever been arrested, and respondent said no. The dispatcher subsequently reported that respondent had two prior arrests for distribution of marijuana. *Ibid.*

While Trooper Gillette was writing the warning ticket, Trooper Graham arrived with his drug-detection dog and began walking around respondent's car. Less than one minute thereafter, while Gillette was still writing the ticket, the dog alerted at the trunk. After being advised of the alert, Gillette searched the trunk and found marijuana. Respondent was arrested and charged with one count of cannabis trafficking. *Id.* 2a-3a, 13a.

2. Respondent filed a motion to suppress the marijuana found in his vehicle and to quash his arrest. The trial court denied the motion (App. 20a-27a) and, following a bench trial, found respondent guilty. Respondent was sentenced to twelve years in prison and ordered to pay a street value fine of $256,136. The Illinois Appellate Court affirmed. App. 11a-19a.

3. In a four-to-three decision, the Illinois Supreme Court reversed. App. 1a-10a. To determine the overall reasonableness of the stop, the majority applied the two-part test of *Terry v. Ohio*, 392 U.S. 1 (1968), "(1) 'whether the officer's action was justified at its inception' and (2) 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* 4a. The majority found that the traffic stop was properly initiated, but concluded that the troopers "impermissibly broadened the scope of the traffic stop" by using the drug-detection dog. *Ibid.*

In so concluding, the majority relied heavily upon *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (2002), cert. denied, 123 S. Ct. 2574 (2003). In *Cox*, the court affirmed, on two separate

grounds, the suppression of evidence obtained by a canine sniff at a traffic stop. First, *Cox* held that the police had improperly extended "the duration of the traffic stop" in order to allow the drug-detection dog to arrive. 202 Ill.2d at 469-470, 782 N.E.2d at 280, citing *People v. Luna*, 322 Ill.App.3d 855, 859, 752 N.E.2d 477 (2001) ("An officer may not stall at the scene of a traffic stop until a drug-sniffing dog arrives and creates probable cause to conduct a search of a vehicle."). Second, putting aside the *duration* of the stop, *Cox* held that the canine sniff improperly extended the *scope* of the stop, and that a sniff may be used only if there are "'specific and articulable facts'" suggesting that drugs are in the vehicle. *Id.* at 470-471, 782 N.E.2d at 280-281.

In the present case, the majority did not find that the troopers had improperly extended the duration of the stop of respondent's vehicle. Rather, relying exclusively upon *Cox*'s second holding, the majority held that the troopers broadened the scope of the stop by employing a canine sniff, and that they had no "'specific and articulable facts' to support" use of the dog. App. 4a-5a. Accordingly, the majority concluded that "the trial court should have granted [respondent]'s motion to suppress based on the unjustified expansion of the scope of the stop." *Id.* 5a.

Joined by Justices Fitzgerald and Garman, Justice Thomas dissented. The dissent chastised the majority for ignoring *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), and *United States v. Place,* 462 U.S. 696 (1983), which both hold that a canine sniff is not a search under the Fourth Amendment. App. 7a. Given this precedent, the dissent reasoned a canine sniff does not transform the seizure of a legitimately detained vehicle into a search. *Ibid.* And because a canine sniff is not a search, the dissent concluded that "the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it." *Id.* 10a.

Justice Thomas explained that the rule of law set down by the majority — that a canine sniff must be justified by a reasonable, articulable suspicion that the vehicle contains illegal drugs — has no conceivable basis in precedent. The dissent noted that if a canine sniff is a search, it must be supported by probable cause, but if a sniff is not a search, then it does not even implicate the Fourth Amendment. *Ibid.* By holding that canine sniffs must be justified by reasonable, articulable suspicion, the majority created an untenable "middle ground," improperly extending *Terry* to searches for incriminating evidence and erroneously equating canine sniffs with *Terry* investigative stops. *Ibid.*

The dissent argued that the appellate court's judgment should have been affirmed, and concluded that the majority's contrary ruling "is wholly incompatible with United States Supreme Court case law construing the fourth amendment and is subject to reversal by that court." *Ibid.*

REASONS FOR GRANTING THE PETITION

Deepening an existing conflict among the courts, and in square conflict with this Court's precedents, the Illinois Supreme Court held that the Fourth Amendment requires police to have reasonable, articulable suspicion before using a drug-detection dog during an otherwise legitimate traffic stop. That ruling cannot be correct. Because a canine sniff does not implicate the Fourth Amendment, use of a drug-detection dog does not transform a legitimate vehicle seizure into an illegitimate vehicle search. Put another way, a Fourth Amendment non-event (here, a canine sniff) remains a Fourth Amendment non-event even if conducted during a legitimate traffic stop. And a legitimate traffic stop remains legitimate when a Fourth Amendment non-event occurs during the stop.

This Court should grant certiorari to ensure uniformity on this important and recurring question and to reverse the Illinois Supreme Court's manifestly erroneous ruling.

A. This Court Should Resolve The Deep Conflict Over Whether The Fourth Amendment Requires Reasonable, Articulable Suspicion To Justify Use Of A Drug-Detection Dog During A Legitimate Traffic Stop.

This Court has twice expressly held that a canine sniff is not a search under the Fourth Amendment. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 706-707 (1983). Since *Place* was decided, numerous courts have confronted whether the Fourth Amendment requires reasonable, articulable suspicion to justify a canine sniff during the course of an otherwise lawful traffic stop. Those courts have reached conflicting results.

The majority of courts have concluded that the use of a drug-sniffing dog during the course of a lawful vehicle stop does not violate the Fourth Amendment. For example, in *Wilkes v. State*, 364 Md. 554, 774 A.2d 420 (2000), Maryland's high court considered facts almost identical to those presented here. A state trooper stopped Wilkes for speeding. The trooper requested Wilkes' driver's license and registration, radioed for verification that they were valid, and requested a check for any outstanding warrants. As the trooper awaited the results, the K-9 unit arrived at the scene, and the dog alerted. The court concluded that because a canine sniff is neither a search nor a seizure, the Fourth Amendment was not implicated. *Id.* at 581, 774 A.2d at 436. Consequently, the trooper "did not need reasonable articulable suspicion of drug-related criminal activity prior to subjecting [Wilkes' vehicle] to the K-9 scan, provided the initial purpose for the stop had not been resolved." *Id.* at 581-582, 774 A.2d at 436.

Many other courts have likewise held that the Fourth Amendment does not require reasonable, articulable suspicion to conduct a canine sniff of a vehicle during a legitimate traffic stop. See, *e.g.*, *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994); *United States v. Moore*, 329 F.3d 399, 403-404 (5th Cir. 2003); *United States v. Ibarra*, 345 F.3d 711, 715 (9th Cir. 2003); *United States v. Holloman*, 113 F.3d 192, 194-196 (11th Cir. 1997); *State v. Bergmann*, 633 N.W.2d 328, 334-335 (Iowa 2001); *State v. Gama*, 112 Nev. 833, 837-838, 920 P.2d 1010, 1013-1014 (1996); *State v. England*, 19 S.W.3d 762, 766-768 (Tenn. 2000).

In clear conflict with these decisions, the Illinois Supreme Court in this case held that the Fourth Amendment requires reasonable, articulable suspicion to justify a canine search during an otherwise legitimate traffic stop. App. 1a-10a. At least one other state court of last resort and one federal court of appeals have reached the same conclusion. See *State v. Wiegand*, 645 N.W.2d 125, 134-137 (Minn. 2002); *United States v. Quinn*, 815 F.2d 153, 159 (1st Cir. 1987).

This conflict among the courts is deep, intractable, and ripe for resolution.*

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* As noted above (p. 4, *supra*), the Illinois Supreme Court did not rest its holding upon any perceived extension of the duration of the traffic stop. That said, courts have also split on whether the Fourth Amendment requires reasonable, articulable suspicion to briefly detain a vehicle after the conclusion of a valid traffic stop in order to conduct a canine sniff. Compare *State v. Box*, 205 Ariz. 492, 73 P.3d 623, 628-629 (App. 2003) (no reasonable, articulable suspicion required to conduct a canine sniff of a vehicle where sniff resulted in brief additional detention); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 648-649 (8th Cir. 1999) (same), cert. denied, 528 U.S. 1161 (2000); *United States v. Hunnicutt*, 135 F.3d 1345, 1350 (10th Cir. 1998) (same), with *United States v. Dortch*, 199 F.3d 193, 198-200 (5th Cir. 1999) (Fourth Amendment violated where

B. The Illinois Supreme Court Erred In Holding That The Fourth Amendment Requires Officers To Have Reasonable, Articulable Suspicion Before Using A Drug-Detection Dog During A Legitimate Traffic Stop.

A sniff by a drug-detection dog is uniquely unobtrusive. Because a canine sniff does not expose items that would otherwise remain hidden, information is obtained without the intrusion or discomfiture associated with a traditional search. *Place*, 462 U.S. at 707. As a result, exposing luggage located in a public place to a trained canine does not constitute a search under the Fourth Amendment. *Ibid.* Likewise, walking a drug-detection dog around the exterior of a seized vehicle does not transform the seizure into a search. *Edmond*, 531 U.S. at 40.

The Illinois Supreme Court, by requiring officers to have "specific and articulable facts" before using a canine sniff during an otherwise legitimate traffic stop, applied a Fourth Amendment analysis where no Fourth Amendment concerns are implicated. And in ruling that the use of a drug-detection dog "impermissibly broadened the scope of the traffic stop into a drug investigation" (App. 4a), the majority failed to recognize that a sniff is not a search, but instead is a Fourth Amendment non-event. As the dissent recognized, the majority doubly erred, for if a canine sniff is a search, it must be supported by probable cause, not merely reasonable suspicion. *Id.* 10a.

It is undisputed on this record that Trooper Gillette was justified in stopping respondent's vehicle for speeding. It is equally clear under this Court's precedents that a canine sniff does not implicate the Fourth Amendment. Yet the Illinois Supreme Court nonetheless concluded that a canine sniff

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police continued to detain vehicle after legitimate traffic stop to allow use of drug-detection dog); *State v. Fields*, 662 N.W.2d 242, 246-247 (N.D. 2003) (same).

implicates the Fourth Amendment if it is conducted during a legitimate traffic stop of a vehicle flagged down for speeding. That is, the court reached the nonsensical and demonstrably incorrect conclusion that a Fourth Amendment non-event plus a legitimate traffic stop equals a Fourth Amendment violation. Because respondent's Fourth Amendment rights were not violated, this Court should grant review of and reverse the Illinois Supreme Court's contrary ruling.

C. The Question Presented Is Important And Recurring.

The question presented here recurs with great frequency. In addition to the cases cited above, see, *e.g.*, *United States v. Arreola-Delgado*, 137 F.Supp.2d 1240, 1246 (D. Kan. 2001) (no reasonable, articulable suspicion required to conduct a canine sniff of a vehicle during the course of a legitimate traffic stop); *United States v. Taylor*, 955 F. Supp. 763, 766-769 (E.D. Mich. 1997) (same); *State v. Brown*, 691 So.2d 637, 638-639 (Fla. App. 1997) (same); *Bradshaw v. State*, 759 N.E.2d 271, 273-274 (Ind. App. 2001) (same); *State v. Carlson*, 657 N.E.2d 591, 594 (Ohio App. 1995) (same).

The importance of the question presented is equally clear. As this Court recently recognized, illegal drugs present a social problem of the greatest magnitude. See *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 835-836 (2002). Although Fourth Amendment guarantees have not and should not be suspended in service of the war on drugs, see *City of Indianapolis v. Edmond*, *supra*; *Kyllo v. United States*, 533 U.S. 27 (2001), where there is no Fourth Amendment prohibition, courts should not prohibit legitimate law enforcement practices even if they are viewed by some to be distasteful. See *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

Drug-detection dogs have become an effective and widely used law enforcement tool. Although this Court has twice

declared that canine sniffs do not implicate the Fourth Amendment, the lower courts remain divided over whether such sniffs may be used during the course of a lawful traffic stop. There is a pressing need for this Court's intervention to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2003

APPENDIX

Supreme Court of Illinois

Docket No. 91547 - Agenda 17 - January 2002.

Filed: November 20, 2003

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ROY I. CABALLES, Appellant.

JUSTICE KILBRIDE delivered the opinion of the court:

Defendant, Roy I. Caballes, challenges the procedures used by police during a routine traffic stop. Defendant unsuccessfully attempted to suppress evidence of marijuana found in the trunk of his car after an alert by a drug-detection dog and was subsequently convicted of one count of cannabis trafficking (720 ILCS 550/5.1(a) (West 1998)). The appellate court affirmed the conviction, finding that reasonable articulable suspicion was not needed to conduct a canine sniff and that defendant was unjustifiably detained by the police for only a *de minimis* period of time. We reverse and hold that the trial court should have granted defendant's motion to suppress based on the unjustified expansion of the scope of the stop. See *People v. Cox*, 202 Ill.2d 462 (2002).

BACKGROUND

On November 12, 1998, Illinois State Police Trooper Daniel Gillette stopped defendant on Interstate Route 80 in La Salle County for driving 71 miles per hour in a zone with a posted speed limit of 65 miles per hour. Trooper Gillette radioed the police dispatcher that he was making the traffic stop. On hearing Gillette's radio transmission reporting the stop, Trooper Craig Graham of the Illinois State Police Drug Interdiction Team announced to the dispatcher he was going to meet Gillette to conduct a canine sniff. Gillette, however, did not request Graham's assistance.

Gillette approached defendant's car, informed him that he was speeding, and asked for his driver's license, vehicle registration, and proof of insurance. Defendant complied with Gillette's requests. Gillette testified that while at defendant's car he noticed an atlas on the front seat, an open ashtray, the smell of air freshener, and two suits hanging in the back seat without any other visible luggage.

Gillette then instructed defendant to reposition his car on the shoulder of the road so the two vehicles would be out of traffic and to come back to the squad car because it was raining. Defendant complied, and Gillette told defendant he was only going to write a warning ticket for speeding. Gillette then called the police dispatcher to ascertain the validity of defendant's license and to check for outstanding warrants.

While waiting for the results of the license check, Gillette asked defendant where he was going and why he was "dressed up." Defendant replied that he was moving from Las Vegas to Chicago. He was accustomed to being dressed up because he was a salesman, although he was not currently employed. Gillette testified that defendant continued to act nervous even after being told he was receiving only a warning ticket. Gillette considered defendant's continued nervousness unusual.

Dispatch informed Gillette that defendant had surrendered a valid Illinois license to Nevada, but the validity of his Nevada license was not confirmed for two more minutes. After receiving that confirmation, Gillette requested defendant's criminal history. He then asked defendant for permission to search his vehicle, and defendant refused to give consent.

Gillette next asked defendant if he had ever been arrested, and defendant responded that he had not. The dispatcher subsequently reported that defendant had two prior arrests for distribution of marijuana, and Gillette began to write the warning ticket. He was interrupted by another officer calling

him over the radio on an unrelated matter. Gillette testified he was still writing the warning ticket when Trooper Graham arrived with his drug-detection dog and began walking around defendant's car. The dog alerted at defendant's trunk in less than a minute. After Graham advised him of the alert, Gillette searched defendant's trunk and found marijuana.

Defendant was then arrested and taken to the police station, where he signed the warning ticket. He was subsequently charged with one count of cannabis trafficking (720 ILCS 550/5.1(a) (West 1998)).

Defendant filed a motion to suppress the drugs found in the trunk and to quash the arrest. The trial court denied the motion and found defendant guilty after a bench trial. Defendant was sentenced to 12 years in prison and ordered to pay a street value fine of $256,136.

Defendant appealed, and the appellate court affirmed, finding that the police did not need reasonable articulable suspicion to justify the canine sniff and that, although the criminal history check improperly extended defendant's detention, the delay was *de minimis*. No. 3-99-0932 (unpublished order under Supreme Court Rule 23). This court granted defendant's petition for leave to appeal. 177 Ill. 2d R. 315.

ANALYSIS

On appeal, defendant challenges the denial of his motion to suppress the evidence uncovered by the canine sniff. This court recently decided a similar issue in *People v. Cox*, 202 Ill. 2d 462 (2002). In that case, we applied the two-part test adopted in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), to determine the overall reasonableness of the stop. *Cox*, 202 Ill. 2d at 467. Although a traffic stop was not at issue in *Terry*, this court has previously applied the principles of that case to routine traffic stops. See *People v. Gonzalez*, 184 Ill. 2d

402, 421-22 (1998) (citing *Michigan v. Long*, 463 U.S. 1032, 1047-52, 77 L. Ed. 2d 1201, 1218-22, 103 S. Ct. 3469, 3480-82 (1983), and *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12, 54 L. Ed. 2d 331, 337-38, 98 S. Ct. 330, 334 (1977)). Accordingly, we will also apply the *Terry* test in this case. We must consider: "(1) 'whether the officer's action was justified at its inception' and (2) 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *People v. Brownlee*, 186 Ill. 2d 501, 518-19 (1999), quoting *Terry*, 392 U.S. at 19-20, 20 L. Ed. 2d at 905, 88 S. Ct. at 1879. Here, it is undisputed that the traffic stop was properly initiated. Thus, we need only examine the second part of the *Terry* test, concerning the reasonableness of the officer's conduct. The State bears the burden of establishing that the conduct remained within the scope of the stop. *Cox*, 202 Ill. 2d at 467.

In *Cox*, we concluded that evidence obtained by a canine sniff was properly suppressed because calling in a canine unit unjustifiably broadened the scope of an otherwise routine traffic stop into a drug investigation. *Cox*, 202 Ill. 2d at 469, 471. We emphasized that the sniff was impermissible without "'specific and articulable facts'" to support the stopping officer's request for the canine unit. *Cox*, 202 Ill. 2d at 470-71.

Here, as in *Cox*, the State has not offered sufficient justification for implementing a canine sniff. The police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs. See *Cox*, 202 Ill. 2d at 469. Although Officer Gillette did not actively summon Trooper Graham and his dog for the purpose of conducting a canine sniff, as occurred in *Cox*, the overall effect remains the same. As in *Cox*, the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation because there were no specific and articulable

facts to support the use of a canine sniff. See *Cox*, 202 Ill. 2d at 469.

Moreover, the observations made by Officer Gillette during the stop that (1) defendant said he was moving to Chicago, but the only visible belongings were two sport coats in the backseat of the car, (2) the car smelled of air freshener, (3) defendant was dressed for business while traveling cross-country, even though he was unemployed, and (4) defendant seemed nervous were insufficient to support a canine sniff. The lack of visible luggage in the interior of the car may be readily explained, since any personal items being transported could have been stored in the trunk or shipped separately. While air fresheners may be used to mask the odor of contraband, air fresheners are also used in cars to mask other odors such as cigarette smoke. As for defendant's choice of travel attire, we fail to see how his stated preference for business clothing suggests any involvement in past or present criminal activity. Also, the general allegation that defendant appeared nervous, without more, cannot serve as a reasonable basis for further detaining defendant. See *People v. Ortiz*, 196 Ill. 2d 236, 266-67 (2001).

Finally, even when these factors are viewed together, they constitute nothing more than a vague hunch that defendant may have been involved in possible wrongdoing. Accordingly, we hold that the trial court should have granted defendant's motion to suppress based on the unjustified expansion of the scope of the stop.

CONCLUSION

Here, as in *Cox*, 202 Ill. 2d at 470-71, a canine sniff was performed without " 'specific and articulable facts' " to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation. Under these circumstances, the trial court should have granted defendant's motion to suppress the evidence obtained after the police dog's alert.

The judgments of the appellate court and the trial court are reversed.

Judgments reversed.

JUSTICE THOMAS, dissenting:

With today's decision, the *dicta* in *People v. Cox*, 202 Ill. 2d 462 (2002), becomes the law. Because I strongly disagreed with the *Cox dicta*, I dissent from the majority opinion.

In *Cox*, this court upheld a suppression order on the basis that the defendant had suffered an illegal detention. *Cox*, 202 Ill. 2d at 469-70. After so concluding, the court tacked on a gratuitous section that concluded that the police may not conduct a canine sniff of a vehicle unless they have a reasonable, articulable suspicion that the car's occupants are possessing a controlled substance. *Cox*, 202 Ill. 2d at 470-71. According to the *Cox* majority, *Terry* principles govern whether the police may conduct a canine sniff of a lawfully detained vehicle. *Cox*, 202 Ill. 2d at 466-68.

As I explained in my dissent, the section of the majority opinion dealing with the canine sniff was *dicta* because the majority had already concluded that the evidence had to be suppressed because the defendant was subjected to an illegal detention. See *Cox*, 202 Ill. 2d at 478 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.); see also *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 470 (1997) (generally, this court will not "engage in speculative analysis or *** render an advisory opinion *** where, as in the instant case, such analysis or opinion is not necessary for the disposition of the cause"). In the case before us, the *Cox dicta* supplies the sole support for the majority's holding, and thus the *dicta* is now the law.

Typically, having once voiced disagreement with an opinion, a justice will follow the opinion in future cases because of *stare decisis* considerations. I cannot do that with *Cox* because that case is wholly incompatible with United States Supreme Court cases construing the fourth amendment. This court is obligated to follow decisions of the United States Supreme Court on questions of federal constitutional law, and I cannot join an opinion that fails to do so.

As I explained in *Cox*, under the Supreme Court cases, a canine sniff is not a search. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000); *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S.Ct. 2637 (1983). In *Cox*, the majority refused to acknowledge that a canine sniff is not a search and failed to discuss *City of Indianapolis* or *Place*. If a sniff is not a search, then the police do not need probable cause to conduct one. Further, allowing a canine to sniff a vehicle that is already detained does not transform the seizure into a fourth amendment search. The Supreme Court made this plain in *City of Indianapolis*:

> "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. [Citation.] The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. [Citation.] Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence or narcotics. [Citation.] Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.' [Citation]" *City of Indianapolis*, 531 U.S. at 40, 148 L. Ed. 2d at 342-43, 121 S.Ct. at 453.

After ignoring the cases holding that canine sniffs are not searches, the *Cox* majority held that sniffs were controlled by *Terry* principles, even though the Supreme Court has made it clear that *Terry* applies only to searches for weapons. It has never been extended to general searches for incriminating evidence. As I explained in *Cox*:

> "I also disagree with the appellate court's holding (and the majority's apparent implied holding) that canine sniffs should be considered limited investigatory stops governed by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). *Terry* allows the police to briefly detain an individual when the officer 'observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.' *Terry*, 392 U.S. at 30, 20 L. Ed. 2d at 911, 88 S. Ct. at 1884. Additionally, the officer is allowed, without a warrant, to conduct a careful limited search of the person when his observations reasonably lead him to believe that the person might be carrying a weapon. The purpose of the 'frisk' is to allow the police, for their own safety and the safety of others, to determine if the person is *armed*. *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883. The Court reached its decision by balancing the need to search against the invasion the search entails. *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 905-06, 88 S. Ct. at 1879-80, quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 18 L. Ed. 2d 930, 940, 87 S. Ct. 1727, 1735 (1967). As Professor LaFave has noted, however, 'there is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found.' 4 W. LaFave, *Search & Seizure* §9.5(g), at 300 (3d ed. 1996). See also *Minnesota v. Dickerson*, 508 U.S. 366, 373, 124 L. Ed. 2d 334, 344, 113 S. Ct. 2130, 2136 (1993)

(sole justification for a *Terry* frisk is the protection of the police officer and others, not to gather evidence); *People v. Flowers*, 179 Ill. 2d 257, 263 (1997) (same); *Arizona v. Hicks*, 480 U.S. 321, 328-29, 94 L. Ed. 2d 347, 356, 107 S. Ct. 1149, 1154 (1987) (refusing to recognize an intermediate type of search between a plain-view inspection and a 'full-blown search' that would merely require a reasonable suspicion); *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 62 L. Ed. 2d 238, 247, 100 S. Ct. 338, 343 (1979) (*Terry* cannot be understood to allow any search whatever for anything but weapons); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 661, 109 S. Ct. 1402, 1414 (1989) (balancing test is appropriate only when warranted by special needs beyond the normal need for law enforcement). Thus, the majority's apparent belief that a canine sniff for narcotics is a search that can be conducted on an officer's mere reasonable suspicion impermissibly extends *Terry* to general searches for evidence." *Cox*, 202 Ill. 2d at 487-88 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.).

The majority's opinion is wholly invalid on this ground because the Supreme Court requires *probable cause* for warrantless searches of vehicles. See, *e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 300, 143 L. Ed. 2d 408, 414-15, 119 S. Ct. 1297, 1300 (1999). If a sniff is a search, then the police cannot conduct one in the absence of probable cause. Thus, in trying to restrict the authority of the *police* in a routine traffic stop, the majority has unwittingly restricted a *defendant's* fourth amendment rights by applying *Terry* to what the majority believes to be a search for incriminating evidence.

In another passage that bears repeating, I pointed out the majority's dilemma:

"In sum, the answer to the question of whether a canine sniff is a search leads to two possible outcomes. If a sniff is a search, then the police need probable cause to conduct one. If a sniff is not a search, then neither the fourth amendment nor article I, section 6, of the Illinois Constitution is implicated. There simply cannot be a 'reasonable suspicion' middle ground because the United States Supreme Court has not expanded *Terry* to general searches for incriminating evidence, as opposed to searches for weapons.

The majority thus refuses to answer the threshold question, because an answer cannot lead to its result. Instead, the majority has issued a policy decision with no foundation in the law." *Cox*, 202 Ill. 2d at 489 (Thomas, J., dissenting, joined by Fitzgerald and Garman, JJ.).

In the case before us, the majority has not held that defendant's vehicle was subjected to an illegal detention. Therefore, because the police did not impermissibly extend the traffic stop to allow the canine to sniff defendant's car, defendant's fourth amendment rights were not violated. The canine sniff was not a search, and thus the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it.

As with *Cox*, this decision is wholly incompatible with United States Supreme Court case law construing the fourth amendment and is subject to reversal by that court. Accordingly, I cannot join in this opinion, or in any other one that follows and applies the *Cox* rule.

JUSTICES FITZGERALD and GARMAN join in this dissent.

No. 3--99–0932

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2001

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the
	)	13th Judicial Circuit,
Plaintiff-Appellee,	)	La Salle County, Illinois
	)	
v.	)	No. 98-CF-447
	)	
ROY I. CABALLES,	)	Honorable
	)	H. Chris Ryan, Jr.,
Defendant-Appellant.	)	Judge Presiding

MODIFIED UPON DENIAL OF REHEARING
ORDER "Not To Be Published"

The defendant, Roy I. Caballes, was indicted for the offense of cannabis trafficking in violation of section 5.1(a) of the Cannabis Control Act. 720 ILCS 550/5.1(a) (West 1998). Defendant filed a motion to suppress evidence, asserting that he was illegally detained. The trial judge denied the motion and the defendant was convicted after a bench trial. The defendant appeals. We affirm.

FACTS

On November 12, 1998, at approximately 5:00 p.m., the defendant was traveling eastbound on Interstate Route 80 in a 1998 Grand Marquis. At the hearing on the motion to suppress, the defendant testified that he passed a white Crown Victoria he estimated was traveling at 60 miles per hour. Illinois State Police trooper Daniel Gillette was driving the Crown Victoria and testified that he was driving at 65 miles per hour, clocked the defendant at 71 miles per hour and effected a traffic stop at 5:06 p.m.

Gillette called the dispatcher at 5:06:42 to check the defendant's license plates. A second state trooper, Craig Graham, heard the call over the radio and immediately started for the scene with his drug-sniffing dog, Krott. Gillette testified that he did not call for Graham because it was Graham's "responsibility as part of the team" to "show up."

Meanwhile, Gillette approached the defendant in his car. Gillette informed the defendant that he was speeding and asked him for his license, vehicle registration and proof of insurance. At the hearing on the motion to suppress, Gillette testified that he saw an atlas on the front seat, the ashtray was open, the car smelled like air freshener, the defendant was dressed up and the only visible luggage was a couple of suits hanging in the back seat. Gillette then told the defendant to pull a little further onto the shoulder, then to come back to the squad car.

After both the defendant and Gillette moved their vehicles, the defendant got into the squad car where Gillette informed him that he was only going to issue a warning ticket. Gillette called the radio dispatcher to check that the defendant's license was valid and whether the defendant had any outstanding warrants. While waiting for the results of the license check, Gillette questioned the defendant about his destination and his attire. The defendant told Gillette that he was moving from Las

Vegas to Chicago because his girlfriend had left him; he was dressed up because he was a salesman and was used to being dressed up although he was not currently employed. Gillette testified that the defendant "acted nervous" and usually people do not act nervous after they are told that they will receive only a warning.

At 5:11:58, the radio dispatcher informed Gillette that the defendant had a valid Nevada license and he had no outstanding warrants. Gillette then asked the dispatcher for a criminal history. While Gillette waited for the results of the criminal history, he asked the defendant for permission to search his vehicle. The defendant refused. When Gillette then asked if the defendant had ever been arrested, the defendant responded that he had not.

Radio dispatch notified Gillette at 5:12:42 that the defendant had two prior arrests for narcotic violations. Gillette then began to write the warning ticket. The exact time that Graham arrived is unclear from the record. Though Gillette testified that he did not know the exact time that Graham arrived, he was writing the warning ticket when he noticed Graham parked behind him. Gillette told Graham that he was writing the warning ticket and Graham should walk his dog around the defendant's car.

Less then one minute later, Graham advised Gillette that the dog alerted at the trunk of the defendant's car. Gillette had not completed writing the warning ticket at this time. Gillette searched the defendant's trunk and found marijuana. At 5:15, Gillette changed the activity code of the stop to a narcotics detention. Gillette seized the narcotics, arrested the defendant and took the defendant to the police station where he had the defendant sign the warning ticket.

The defendant was charged with one count of cannabis trafficking. Defendant filed a motion to suppress the evidence

seized and quash the arrest. At the hearing to suppress the evidence, the trial court denied the motion, finding that the traffic stop and the detention to write the warning ticket were proper and there was no unreasonable delay. After a stipulated bench trial, the defendant was found guilty of cannabis trafficking, sentenced to 12 years incarceration and assessed a street value fine of $256,136.

DISCUSSION

The defendant argues that the motion to suppress should have been granted because (1) Gillette prolonged the stop past what was required to complete the "business portion" of the stop by requesting the defendant's criminal history; (2) Gillette issued a written warning when a verbal warning was within his discretion; and (3) Gillette did not have probable cause to search his vehicle after the dog alert because dog alerts are unreliable.

When ruling on a motion to suppress, it is the function of the trial judge to determine the credibility of the witnesses and to resolve any conflict in their testimony. People v. Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2d 605 (1995). A trial court's determination on a motion to suppress is therefore entitled to great deference. Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2d 605. Accordingly, the trial court's decision on a motion to suppress will not be reversed unless it is manifestly erroneous. People v. Kidd, 175 Ill.2d 1, 675 N.E.2d 910 (1996). However, the trial court's determination of reasonable suspicion to stop a vehicle and probable cause to conduct a search is subject to de novo review. Kidd, 175 Ill.2d 1, 675 N.E.2d 910.

I.

Stopping a vehicle for a traffic violation does not justify a search of the person or the vehicle. People v. Evans, 259 Ill. App. 3d 650, 631 N.E.2d 872 (1994). Prior to a dog's alert,

there is no basis for a search of a vehicle. Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2d 605. If a defendant is not lawfully detained at the time of the alert, the search was unlawful. Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2D 605.

When a police officer stops a vehicle for a minor traffic violation, the officer may briefly detain the driver to request a valid driver's license and, under certain circumstances, conduct a speedy warrant check. Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2d 605. Where the officer's suspicion is aroused during the initial inquiries, further detention may be warranted. People v. Easley, 288 Ill. App. 3d 487, 491, 680 N.E.2d 776, 779 (1997). When deciding whether reasonable suspicion exists to justify the detention, a court must consider the totality of the circumstances. Easley, 288 Ill. App. 3d at 491, 680 N.E.2d at 779. Even if there is an innocent explanation for each individual factor considered separately, the factors viewed in combination may constitute enough reasonable suspicion to warrant further detention. United States v. Finke, 85 F.3d 1275, 1280 (7th Cir. 1996).

A.

The defendant argues that trooper Gillette was limited to the inquiries required to issue a warning. Those inquiries are a valid license check and an outstanding warrant check. He contends that Gillette did not have a reasonable articulable suspicion of criminal activity to request the criminal history.

The State asserts that Gillette had a reasonable articulable suspicion because 1) defendant said he was moving to Chicago, 2) there was an atlas on the front seat, 3) the vehicle smelled like air freshener, 4) the defendant was dressed up and said he was accustomed to dressing up for work though he was currently unemployed, 5) defendant had no luggage in the interior of the car, other than two hanging suits, and 6) defen-

dant continued to act nervous after Gillette informed him that he would only receive a warning.

These facts, however, amount to a series of hunches or speculations that do not support a reasonable articulable suspicion that the defendant had committed or was about to commit a crime. See People v. Ruffin, 315 Ill. App. 3d 744, 751, 734 N.E.2d 507, 512 (2000). Mere hunches or unparticularized suspicion are not enough to establish reasonable articulable suspicion. People v. Stewart, 242 Ill. App. 3d 599, 606, 610 N.E.2d 197, 202 (1993). Without a reasonable articulable suspicion, Gillette was not justified in detaining the defendant for the purpose of running a check of the defendant's criminal history. See Easley, 288 Ill. App. 3d at 491-92, 680 N.E.2d at 779.

B.

Defendant asserts that even if there was a reasonable articulable suspicion to request his history, Gillette did not need a criminal history to write the defendant a warning; rather, he used the criminal history request as a stalling tactic to give Graham an additional three minutes to arrive with the dog. Therefore, the extended detention was unreasonable.

The brevity of the stop is an important factor in determining whether the stop was reasonable. Koutsakis, 272 Ill. App. 3d at 164, 649 N.E.2d at 609. However, there "is no talismatic (sic) time beyond which a traffic stop * * * becomes an unreasonable seizure." Koutsakis, 272 Ill. App. 3d at 164, 649 N.E.2d at 609. When deciding whether a detention was reasonable, the totality of the circumstances must be considered. See Easley, 288 Ill. App. 3d at 492, 680 N.E.2d at 779.

On direct examination, Gillette testified that a criminal history check took less than one minute. On cross examination, however, a question was raised concerning the length of delay

caused by the request of the defendant's criminal history. However, the radio dispatch transcript reveals that Gillette's testimony on direct is accurate and Gillette received the defendant's criminal history 44 seconds after dispatch informed him that defendant had a valid Nevada license.[1]

Viewing the totality of the circumstances, we find the 44 second delay to be *de minimus*. From the beginning of the stop to the moment when Gillette changed the code to a narcotics detention was less than nine minutes. It was six minutes into the stop before radio dispatch was able to confirm that the defendant's Nevada driver's license was valid. Gillette then requested the criminal history and started the write the ticket. Graham arrived, walked the dog and told Gillette that the dog had alerted. Gillette then searched the defendant's car, found contraband, and changed the stop code to a narcotics arrest. The trial judge found that "[n]ine minutes to stop to narcotics arrest" was not "an unreasonable delay." We would add that 44 seconds to check the defendant's history was not an unreasonable delay under the totality of the circumstances. Based on this sequence of events, we cannot say that the trial judge's decision was manifestly erroneous.

II.

The defendant next contends that Gillette was required to issue a verbal warning, not a written warning, to keep the intrusion as minimal as possible. He says that because Gillette

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[1] The radio dispatch transcript of the stop shows the following time line: 1. At 17:09:02, Gillette gave defendant's name to radio dispatch to run the ID checks. 2. At 17:09:58, the dispatch tells Gillette that a valid Illinois license had been rendered to Nevada. 3. At 17:11:58, defendant's driver's license in Nevada came back valid. Gillette then immediately requested defendant's criminal history. 4. At 17:12:42, dispatch reported defendant's criminal history.

could have issued a verbal warning, the written warning was merely a ruse to stall for more time to allow Graham to arrive with the dog. Therefore, the extended detention was unreasonable.

It is a long-accepted practice that an officer may issue a written warning. Koutsakis, 272 Ill. App. 3d at 164, 649 N.E.2d at 609; See also People v. Perez, 288 Ill. App. 3d 1037, 681 N.E.2d 173 (1997); People v. Sesmas, 227 Ill. App. 3d 1040, 591 N.E.2d 918 (1992). The defendant cites no authority, nor did we uncover any, which requires an officer to issue a verbal warning instead of a written warning. Furthermore, Gillette testified that information from a written warning is entered into the TIPS tracking system, allowing a trooper to check whether an individual has received a warning for a traffic violation within the last twelve months. We reject the defendant's argument that Gillette was required to issue a verbal warning as the least intrusive detention.

III.

The defendant also argues that the dog alert was unreliable because it was not trained in associative odors. Therefore, Gillette did not have probable cause to search the defendant's car.

It is widely accepted that an alert by a trained dog provides probable cause for a search.[2] Easley, 288 Ill. App. 3d at 492,

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[2] Defendant asserts that the recent Fifth District case of People v. Cox, 318 Ill. App. 3d 161, 739 N.E.2d 1066 (2000), is controlling and requires a canine sniff to be supported by reasonable suspicion of criminal activity. We reject Cox. If a canine unit arrives and performs a sniff prior to the conclusion of a traffic stop, reasonable suspicion is not required. Illinois law requires that an officer must have a reasonable articulable suspicion to detain a person beyond the conclusion of a valid traffic stop for the purpose of conducting a canine sniff. See Easley, 288 Ill. App. 3d 487, 680 N.E.2d 776, Koutsakis, 272 Ill. App. 3d 159, 649 N.E.2d 605. If a defendant is lawfully detained at the time of a canine alert, the officer has probable cause to search. See Koutsakis, 272 Ill. App. 3d at 163, 649 N.E.2d at 608.

680 N.E.2d at 780, Koutsakis, 272 Ill. App. 3d at 163, 649 N.E.2d at 608, Finke, 85 F.3d at 1282. The court assessed the credibility of the expert testimony concerning the dog's training and certification and found that the dog's training was reliable. The search was proper because it was based upon probable cause provided by a reliable dog alert. The court's decision was not manifestly erroneous.

CONCLUSION

The judgment of the circuit court of La Salle County is affirmed.

Affirmed.

LYTTON, J., with HOMER, P.J., and SLATER, J., concurring.

[ENTERED: April 9, 2001]

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT, LASALLE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
	)	No. 98-CF-447
v.	)	
ROY I. CABALLES,	)	Honorable H. Chris Ryan, Jr.,
Defendant.	)	Judge Presiding.

Excerpt from Transcript of Proceedings, August 26, 1999

* * *

THE COURT: All right. Gentleman, I've read through the tran -- my notes I've taken with regard to the hearing on the Motion to Quash the Arrest and Suppress Evidence. I've gone through every one of your exhibits that you presented to me. This is the radio logs and the officers' individual code logs of the radio transmissions, that of Officer Graham and of Officer Gillette. All right.

Now, and I've also read the decision Brownlee which the defense has argued.

Let me start out by saying this is a motion, as I indicated, to quash arrest and suppress evidence. The burden is on the defendant to show that Fourth Amendment rights were violated of this particular defendant. First, let me start by stating there

was a stipulation presented into evidence by the parties that the times were accurate on the radio code sheets and the radio logs and the, I guess you would say, the translation of the communication between dispatch and the individual officers.

Given that stipulation, the times are accurate, I do notice, gentlemen, that there are some times which conflict, that I will state, between the actual officers' log and the actual transcription of the communication between dispatch and the officers and between the officers and themselves. And I notice on the radio sheet that time -- it states times but I don't see where there is much of a conflict because there are kind of times on their own as far as when stuff has been presented.

Suffice it to say that after you're done reading everything, it's certainly clear that Officer Gillette started the radio transmissions at 17:06 and at 5:15 they went into a narcotic arrest. That's nine minutes from the first transmission by Officer Gillette until the code change and that's by -- I don't care whose log you're going to use or officers' codes or transcriptions.

I'll then move on to let's start from the very beginning of the stop. The question becomes whether or not this gentleman was speeding. Did the officer have a valid reason to stop? We all know pretext stops by the laws in the state of Illinois are right. I don't know whether or not there was a pretext because no evidence was presented to that extent. It was merely a traffic stop. Officer Gillette said he was speeding. The State by stipulation brought in Officer Heinrich who had a subsequent conversation. The defendant made some statement to that extent. The defendant denies these statements. And so, therefore, I have two officers, one who is in court I can judge by live testimony and the other one by stipulation that said the defendant had made some reference I can't believe I was stopped for only doing -- for doing 70 in a 65.

From that particular circumstance and balancing it, gentlemen, I'm going to find that there was a valid basis for the stop. I have no reason to disprove it, disbelieve it. That would cause me to believe that several officers were in cahoots on this as opposed to a one-on-one test of credibility. I find by the number of officers that say it occurred, that I find that a valid traffic stop did occur for the offense of speeding.

There was some question of impeachment with regard to rain or no rain. I do not find that to be very persuasive. It's interesting but I do not find it to be such persuasive value that it would cause me to believe that the officer was fabricating this particular stop. Heavy rain, light rain, suffice it to say it was raining that day, gentlemen. I don't find that conflict in the evidence to be so overwhelming that it's going to cause me to find Officer Gillette was less than truthful on the basis for the stop. I find there's a valid traffic stop.

Summing up, it appears that Officer Gillette approached the vehicle, asked for the license registration, insurance to which he is entitled to do. Following the finding of the court there was a valid stop, he's entitled to do so. He asked the defendant to return to the car. He didn't allow the defendant to stay in the car. He asked him to go with him. Was that a command, gentlemen? I don't know. All I have he asked him and the defendant complied. Now, the law is very clear. An officer has a right to run a valid or a license registration on an individual that they have stopped once they have a proper stop. He has the right to run that information.

In this particular circumstance there seems to be some conflict as to whether or not the officer at the scene, at the initial stop said I'm going to give you a warning ticket. For purposes of argument, gentlemen, had he said it there or in the squad and the officer said he wasn't sure where he said it but he did tell him he was going to give him a warning ticket. For purposes of argument, gentlemen, I don't think that makes any

difference. If you tell somebody you're going to give them a warning ticket, at that point whether it was by the car, you still have the right to run the wants and warrants and whether or not the individual has a valid license.

For further purpose of argument, I'm sure that if this gentleman came back revoked, I bet he wouldn't have gotten a warning ticket. He would have gotten a citation then. But I don't find that for purposes of whether or not the stop should have stopped right there, whether it was over and through, I don't find that persuasive. The officer had the right to run that test. Run the background test.

Brownlee even seems to let that go. In that particular circumstance the officers did ask for registration identification of everybody in the car. Went back and ran it and decided that they were going to let them go. Returned to the vehicle, handed back the driver's license identification to the individuals and waited a few minutes and then asked for a consent. The supreme court indicated that once they handed back the license, that was it. The stop was through. It was completed. And the few minute delay was in violation. It was too long.

I don't have that fact pattern here, gentlemen. The officer was running the history of this particular defendant and during the course of that run from nine minutes from the start to the code of active of narcotic arrest, he was going through a process of checking the criminal history. Now, it started 5:06, all right. From what I can gather it looks to me like that about 5:12 from dispatch the criminal history came back. Now, does he have a right to ask for a criminal history? Probably not. But you read through these transmissions, gentlemen, or the radio between dispatch and Officer Gillette, it looks like he asked for a lot over a very short period of time. He started 5:06. He started to get some responses back at about 5:09. And at 5:09 it appears that he -- at 5:12 a criminal history was brought back. That, gentlemen, is approximately six minutes.

Now, he's writing out a warning ticket. It doesn't take you that long to write out a warning ticket. It takes probably at the most a minute. But was he writing during that entire time? I don't know. I don't know. I'm sure he was writing it but I don't know whether or not he started writing it after he got the criminal history or was he writing it before. I'm not sure. But it's not a departmental policy to write a warning ticket. I agree. That seems to be the evidence. That's an individual officer preference it appears. Officer Gillette, in this particular circumstance, exercised his discretion and wrote an individual warning ticket, a written one. He could have just as easily given an oral one. I believe that he testified he has done so in the past but at this time he chose to give a written and during that period of time, Officer Graham arrived about 5:13, according to the radio transmission dispatch. It looks to me like he showed up, walked and two minutes later they're into a narcotics arrest.

Brownlee, gentlemen, let me first -- Brownlee I don't find controlling here. I don't find it controlling. I find it to the point of the return of the license, Brownlee court seems to say once you gave that license back, that was it. This wasn't a circumstance where they actually gave any licenses back. He was still holding on the license from 5:06 to approximately 5:15 or 5:13 when Officer Graham apparently made some indication that a stop had occurred that Krott, the dog, had hit.

In the Brownlee decision the officers are free to request permission to search. They can do so. Officer Gillette asked. It was refused. The problem in the Brownlee was the officers requested permission to search the car after they had already returned it. We don't have that here so I don't find Brownlee controlling. It was still in a situation where it was a stop. If Officer Graham had given him the individual license and returned it and says, okay, the stop is over, you're free to go and, by the way, can I ask you to search your car. Brownlee

would certainly then start to become extremely controlling, I would think.

Now, if there's going to be an argument made on later on in the years, gentlemen, as far as, well, here comes the delay, we're trying to get around Brownlee by never handing his licenses back to him. Well, that becomes an unreasonable delay also. Nine minutes to stop to narcotics arrest or narcotics switch, I don't see as being an unreasonable delay. I don't find that time frame to be unreasonable for an officer to do even though it probably only took him a minute to write that warning ticket. Running the history of the individual defendants, running through the background, looking at his license and seeing whether or not he had any wants or warrants. By the own radio transmission of dispatch from 5:06 Officer Gillette didn't start to get that back until about 5:09, 5:10 is when he starts to get some responses back. So he even had to wait a little bit. So if you went to 5:10 up until 5:15, now, Gillette had to get out of the car somewhere and open that trunk and look in there so maybe it's 5:14. Maybe it only took a minute to walk to the car to the trunk and look. So we've got four minutes from the time that it came back for him to write it and walk around.

Now, Graham showed up at 5:13. So there's two minutes or three minutes we're starting to get into as far as taking Officer Gillette to write out the warning ticket. A lot of the holes are left open in this case, gentlemen. I don't know and I'm not going to assume the facts. I'm just saying here are some areas that are open. I find they had a valid reason to stop. I don't find the Brownlee decision to be controlling here as far as a pretextual delay of any excess amount.

Move on to the third question, gentlemen, is the reliability of this particular dog and Officer Graham. I have a Mr. Craig who testified, who is a consultant in animal behavior, that in his opinion after reading everything that was provided to him, that

Officer Graham and Krott were not properly trained in his opinion. Gentlemen, I don't look at Krott as a confidential informant. Krott doesn't run around with the type of people that you usually want to test confidential informants. I don't think he hangs out with people who use drugs or commit illegal crimes. I think he hangs around -- I would look at Krott more as a fellow officer or as a neutral citizen. He has no motive to lie as a neutral citizen. As a fellow officer, his training is important also.

Graham and Krott might not have been trained at a level that Mr. Craig thinks they should be but I'm left with Officer Graham's testimony that in the past Krott and Mr. Graham have had an experience and they've proved to be reliable in the past and found controlled substances. I'm sure nobody is infallible. I don't even think a police officer is infallible and I'm sure that dog is not infallible. The dog has no basis to falsify. It may have gotten false hits. It may not have had its desensitization training in odor elimination but Mr. Graham (sic) does not convince me to such a degree that I would say that dog is unreliable. I cannot find by the defendant's case that Mr. Graham (sic) is going to convince me that dog is unreliable. Its training may be less than what certain fields or agencies may require or would want to see but it has been trained. It has to go through recertification. The department of the state police. It has capabilities in the past of showing that it has found controlled substances. I think the dog is sufficient and reliable. That Officer Graham could reply upon the dog's actions and conduct and that Officer Gillette could rely upon Officer Graham as a fellow officer engaged in a common investigation to determine the probable cause existed to search that trunk.

So therefore, gentlemen, for those reasons I'm going to find that the Motion to Quash the Arrest and Suppress the Evidence is to be denied. The defendant has failed to put forth enough evidence to show that the Fourth Amendment rights of the

defendant were violated in the circumstances. There is your record, gentlemen. You can take it up.

With that ruling in place, gentlemen, when would you like to set this back on the trial call?

* * *

Supreme Court, U.S.
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(3)

No. 03-923

In the Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROY I. CABALLES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court is published at 207 Ill. 2d 504, 802 N.E.2d 202 (Ill. 2003), and is on pages 1a through 10a of the Appendix to the Petition for Certiorari (Pet. App.). The judgment of the Illinois Appellate Court is reported at 321 Ill. App. 3d 1063, 797 N.E.2d 250 (Table) (Ill. App. 3d Dist. 2001). The unpublished opinion of the Illinois Appellate Court is available at Pet. App. 11a–19a. The Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, issued an unreported, oral ruling; the text of this ruling is available at Pet. App. 20a–27a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Illinois State Police Trooper Daniel Gillette stopped respondent Roy Caballes on November 12, 1998, for driving 71 miles per hour on a portion of Interstate 80 where the speed limit was 65 miles per hour. (Pet. App. 1a). After initially stopping Caballes, the trooper instructed him to move his car further out of the way of traffic, asked Caballes to sit in the squad car, and informed him that he was only going to issue Caballes a warning ticket. (Pet. App. 2a). The trooper called a police dispatcher to deter-

mine whether Caballes's driver's license was valid, and to check for outstanding warrants. *Id.*

While waiting for results of the check, Trooper Gillette queried Caballes about his destination and his business attire. After being informed that Caballes's driver's license was valid, Trooper Gillette continued to question Caballes, asking him about his criminal history, and he requested the dispatcher to conduct a criminal background check. Subsequently, the trooper asked Caballes for permission to search his vehicle. Caballes refused. (Pet. App. 2a). Next, Trooper Gillette asked whether Caballes had ever been arrested, and Caballes answered that he had not. The dispatcher then reported that Caballes had two prior arrests for distribution of marijuana. Trooper Gillette then discussed an unrelated matter with another trooper on his radio. (Pet. App. 2a-3a). Trooper Gillette testified that he had still not completed writing the warning ticket for speeding when another trooper arrived with a drug-detection dog. (Pet. App. 3a).

The second trooper walked the drug-detection dog around Caballes's car, and the dog alerted at the trunk. (Pet. App. 3a). The police officers searched the trunk of the car and found marijuana. (Pet. App. 3a). Caballes was arrested and charged with one count of cannabis trafficking. (Pet. App. 3a).

At trial, Caballes moved to suppress the drug evidence found in the trunk of his car. (Pet. App. 3a). The trial court denied the motion and, after a bench trial, found Caballes guilty. (Pet. App. 3a). Caballes appealed the trial court's decision not to suppress the evidence, and the Illinois Appellate Court affirmed. (Pet. App. 3a).

The Illinois Supreme Court reversed the decision of the Illinois Appellate Court, holding that the behavior of the state troopers in expanding the scope of the traffic stop was unreasonable under the standards articulated in *Terry v. Ohio*, 392 U.S. 1 (1968). (Pet. App. 4a, 6a). As Caballes did not dispute the proper initiation of the traffic stop, the court based its holding on the second portion of the *Terry* test, which asks "whether [the expansion in the scope of the traffic stop] was reasonably related in scope to the circumstances which justified the interference in the first place." (Pet. App. 4a).

In holding that the expansion in scope of the traffic stop was not reasonably related to the initial reason for the stop, the court relied on its previous "similar" holding in *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (Ill. 2002), *cert. denied*, 123 S. Ct. 2574 (2003). (Pet. App. 4a, 5a). The Court held that Caballes's traffic stop suffered from defects similar to those at issue in *Cox*. (Pet. App. 4a, 5a). The police officers did "not offer[ ] sufficient justification for implementing a canine sniff" (Pet. App. 4a) and "further detaining defendant." The police officers had "nothing more than a vague hunch that [Caballes] may have been involved in possible wrongdoing." (Pet. App. 5a). Based on these defects, the Illinois Supreme Court held that "the trial court should have granted defendant's motion to suppress the evidence" because the police officers "unjustifiably enlarg[ed] the scope of a routine traffic stop." (Pet. App. 5a).

REASONS FOR DENYING THE PETITION

Petitioner argues (Pet. 5, 8, 9) that certiorari should be granted to review the Illinois Supreme Court's holding that a canine sniff is a search within the meaning of the Fourth Amendment, requiring reasonable, articulable suspicion as justification. But, the Illinois Supreme Court held no such thing. Rather, the Court's decision instead reflects a fact-based application of a widely followed test adopted from *Terry v. Ohio* to govern the duration and scope of traffic stops under the Fourth Amendment. Because this case is a

poor vehicle for exploring the issues raised in the petition, the petition of certiorari should be denied.

I. THE ILLINOIS SUPREME COURT BELOW UNCONTROVERSIALLY HELD THAT PROLONGATION OF A ROUTINE TRAFFIC STOP—INCLUDING ADDITIONAL QUESTIONING, A CRIMINAL BACKGROUND CHECK, AND A CANINE SNIFF—VIOLATED THE FOURTH AMENDMENT'S BAN ON UNREASONABLE SEIZURES, NOT THAT A CANINE-SNIFF ITSELF WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

Petitioner fundamentally errs in arguing that the Illinois Supreme Court held a canine-sniff to be a search under the Fourth Amendment. Rather, the court below held that its decision was based "on the unjustified expansion of the scope of the stop" (Pet. App. 1a, 5a), not on the nature of a canine sniff *vel non*. The court relied on this Court's test in *Terry* to frame the inquiry, asking whether the police officers' conduct in this case "was reasonably related in scope to the circumstances which justified the interference in the first place." (Pet. App. 4a). In concluding that there had been an "unjustified expansion of the scope of the stop," (Pet. App. 5a), the court followed *Terry* and the many federal appellate and state courts that apply *Terry* to the question of whether the scope of a routine traffic stop has been impermissibly enlarged.

The only conceivable issue arising from the case below is whether *Terry* prohibits law enforcement authorities from expanding the scope of investigations after traffic stops as well as prolonging the traffic stops themselves. Any ambiguity in the Illinois Supreme Court's decision below arises from the court's use of the term "scope", which refers under Illinois precedent both to the duration of the stop and

to the nature of the investigation. Illinois courts consider both aspects of scope in considering the constitutionality of law enforcement actions after a traffic stop. There is no ambiguity, however, but that the court invalidated the search due to the expanded scope of the search, not because the canine-sniff was a search.

The Illinois Supreme Court's intent in this case can be ascertained from its reliance (Pet. App. 3a) on its prior decision in *Cox*. The court explained that it "recently decided a similar issue" in that case. In *Cox*, police officers pulled the defendant over for not having a rear registration light. *Id*. at 464. A canine unit was called to the traffic stop and arrived 15 minutes later while the officer was still writing the traffic ticket. *Id*. A police officer walked the canine around the defendant's car, and the dog alerted the officer to the presence of drugs in the vehicle. *Id*. at 464-65. The court found that, had the traffic stop not been impermissibly extended, the defendant would have left the scene before the canine unit arrived. *Id*. at 470.

In *Cox*, the court—as in this case—used a *Terry* analysis to determine whether the extended detention of the defendant was justified. *Id*. at 466-67. The court explained that, to fulfill the requirement that the detention be reasonably related in scope, a detention must be "temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id*. at 467 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Thus, the Illinois court interpreted the scope requirement from *Terry* as dealing directly with the length of the stop. Using the above *Terry* analysis, the Illinois Supreme Court in *Cox* found that, although the officer was still writing the ticket when the canine unit arrived, the detention time for such a routine minor traffic stop should have already concluded. *Id*. at 470 (citing *People v. Luna*, 322 Ill. App. 3d 855, 859, 752 N.E.2d 477 (Ill. App. 2d Dist. 2001) ("An officer may not stall at the

scene of a traffic stop until a drug-sniffing dog arrives and creates probable cause to conduct a search of a vehicle"). Although the Court refused to impose a rigid time limitation on the duration of a traffic stop, it determined that, under the facts of the case, the officer's decision to prolong the detention violated the Fourth Amendment.

Petitioner apparently argues (Pet. 4) that *Cox* also held that a dog sniff is a search under the Fourth Amendment. The court in *Cox*, however, never so held. It did, however, suggest that it would take into account all facts surrounding the seizure, including whether the scope of the investigation had changed. The court stated that, to expand the scope of the stop, whether in terms of duration or change in the nature of the investigation, the officer must have "specific and articulable facts." *Id*. at 470-71. If there are no specific and articulable facts that would justify expanding the scope of the traffic stop, the extended investigation is unconstitutional. *Id*. at 470.

But, the key element in *Cox* was that, in the court's view, there were no facts that "reasonably warranted an *extended detention* . . ." and that the "defendant's detention . . . was *overly long*." *Id*. at 470-71 (emphasis added). The dissent in *Cox* understood this to be the holding as well when it asserted that the majority failed to address the issue specifically raised on appeal: whether a canine-sniff is a search under the Fourth Amendment. *Id*. at 472. Indeed, the dissent vigorously accused the majority of ignoring the issue being appealed and instead basing its holding on the "spontaneous realization that the 15-minute traffic stop was unnecessarily and illegally long."

In this case, as in *Cox*, the troopers extended the duration of the traffic stop. After pulling the defendant over for going six miles over the speed limit, the trooper informed respondent that he would only get a warning. Nonetheless, the trooper requested a dispatcher to check whether respon-

dent's license was valid and whether he had any outstanding warrants. The trooper questioned Mr. Caballes about his travel plans and wardrobe. Even after determining that he had no warrants outstanding and that his driver's license was valid, the trooper further questioned the defendant about his criminal history and asked to search his car. Subsequently, the trooper ordered a criminal history check, still keeping respondent in the squad car. Next, the trooper discussed an unrelated matter with a colleague over the radio. At no time did petitioner suggest that Mr. Caballes was free to leave. Only after the questioning, the background checks, continued questioning, and the unrelated radio conversation, did the officer apparently begin writing the warning ticket. (Pet. App. at 2a). The court below may well have concluded that the officer was stalling to permit the canine unit more time to arrive. At the very least, there was no legitimate reason to prolong the detention after the officer determined that Mr. Caballes had a valid driver's licence and no outstanding warrants. As the court noted, petitioner's proffered justifications "cannot serve as a reasonable basis for *further detaining* defendant." *Id*. at 5a. (emphasis added). *See People v. Bunch*, 207 Ill.2d 7, 17, 796 N.E.2d 1024 (Ill. 2003) (seizure invalidated because officer extended defendant's detention by questioning him after purpose of stop was completed); *People v. Gherna*, 203 Ill.2d 165, 186, 784 N.E.2d 799 (Ill. 2003) (once officer had completed reason for stop, it was inappropriate to continue the detention); *People v. Brownlee*, 186 Ill.2d 501, 521, 713 N.E.2d 556 (Ill. 1999) (seizure invalidated because following completion of traffic stop, officers continued detention of defendants for several minutes).

To escape the logic of *Cox*, petitioner asserts (Pet. 9) that "the court reached the nonsensical and demonstrably incorrect conclusion that a Fourth Amendment non-event plus a legitimate traffic stop equals a Fourth Amendment

violation." Petitioner's argument is misconceived. Even though the passage of time by itself is not a Fourth Amendment "event", in petitioner's language, prolongation of a seizure can itself violate the Fourth Amendment. Indeed, *United States v. Place* so holds—"The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." 462 U.S. 696, 709 (1983).

Furthermore, federal courts have deployed tests similar to that of the court below in determining the legitimacy of expansions of routine stops, whether through canine-sniffs, criminal history checks, or questioning unrelated to the initial stop. Courts have analyzed traffic stops as analogous to *Terry* investigative stops. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). A number of courts have held that, lacking reasonable suspicion or consent, expansion of the scope of investigation at a traffic stop violates the Fourth Amendment when it unreasonably extends the duration of the stop. *U.S. v. Jones*, 269 F.3d 919, 925 (8th Cir. 2001); *U.S. v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999); *U.S. v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995). In these cases, as in the present case, the courts have not ruled that any of the investigative techniques—canine-sniffs, background checks, or questioning—do or do not require reasonable suspicion as a matter of law, but rather make an inquiry into the specifics of the case to determine whether extending the duration of a stop is reasonable under the circumstances.[1]

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[1] There is no basic conflict among the courts of appeals as to whether prolonging the duration of a seizure after a traffic stop violates the Fourth Amendment. All agree that the inquiry, framed by *Terry*, depends upon the facts of each case. Petitioner's suggestion of a conflict (Pet. 7 n.*), is unpersuasive—courts have merely relied on different factors in determining whether a particular stop was too long. The court of appeals' decision in

(continued...)

For instance, in *Pruitt*, an officer stopped a car for speeding and asked the driver to accompany him to his car so that he could write up the ticket. 174 F.3d at 1217. After obtaining the driver's license and registration, rather than writing the ticket immediately, the officer asked a number of questions, unrelated to the speeding violation, to the driver and passengers. *Id.* at 1218. The officer requested permission to search the car, which was denied. *Id.* The officer told the driver that more time was required to complete the ticket, then requested and waited for a canine unit. *Id.* The canine sniff was conducted nearly a half hour after the initial stop. *Id.* The *Pruitt* court found that lengthening the detention beyond the time necessary to effectuate the purpose of the stop, in this case the issuance of a speeding ticket, constituted a Fourth Amendment violation in the absence of reasonable suspicion or consent. *Id.* at 1220.

Similarly, in the present case, the trooper, after obtaining the necessary information for the warning and having his request for permission to search the car denied, delayed completing the warning citation by waiting for a criminal background check, asking further questions, and talking on the radio concerning an unrelated matter. In neither *Pruitt* nor the present case is the court's ruling based strictly upon the canine-sniff. Rulings like these on the legitimacy of the expansion of the scope of a traffic stop are based upon a duration test that considers the specific facts and the totality of the circumstances in each case and does not issue an absolute rule of law regarding the legitimacy of canine-

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(...continued)
United States v. Hunnicutt, 135 F.3d 1345, 1350 (10th Cir. 1998), cited by petitioner, relied instead on the fact that police officials had reasonable suspicion to conduct the canine-sniff.

sniffs in routine traffic stops.[2] Viewed in this light, the Illinois Supreme Court's decision regarding the prolonged duration of the seizure is not only unexceptional, it is clearly consistent with other courts' disposition of similar cases.

II. TO THE EXTENT THAT THE ILLINOIS SUPREME COURT'S DECISION RELIED IN PART ON THE FACT THAT THE POLICE OFFICERS IMPERMISSIBLY CHANGED THE NATURE OF THE INVESTIGATION THROUGH THE QUESTIONING, BACKGROUND CHECK, AND CANINE SNIFF, THIS CASE DOES NOT WARRANT FURTHER REVIEW BOTH BECAUSE THE PETITIONER HAS NOT RAISED THIS CLAIM AND BECAUSE THE DECISION, IN ANY EVENT, CAN BE JUSTIFIED SOLELY ON THE BASIS OF THE EXTENDED DURATION OF THE SEIZURE

As previously discussed, there is language in the Illinois Supreme Court's opinion suggesting that its decision was based not only on extension of the traffic stop but also on the fact that the trooper erred in changing the nature of the stop. The court remarked that the police officers "impermissibly broadened the scope of the traffic stop . . . into a drug investigation." (Pet. App. 4a). In prior cases, including *Cox*, the court has stated that the police may not alter the basic purpose of a seizure after a traffic stop.

For instance, in *People v. Gonzalez*, 204 Ill.2d 220, 222 (Ill. 2003), the defendant was a passenger in a car that was

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[2] Other state court cases have also adopted a *Terry* analysis to assess whether the duration of the stop was excessive. *See, e.g.*, *Damato v. State*, 64 P.3d 700 (Wyo. 2003); *State v. Carlson*, 15 P.3d 893 (Mont. 2000); *State v. Fields*, 662 N.W.2d 242 (N.D. 2003).

pulled over for not having a front license plate. While one officer questioned the driver, another officer questioned the defendant passenger and asked for his identification. *Id.* The exchange subsequently led the officer to discover drugs on the defendant. The issue before the Court was whether the officer's questioning violated the Fourth Amendment by impermissibly changing the scope of the seizure. The Illinois Supreme Court clarified that, in its view, *Terry* requires both that the traffic stop be limited in duration and that the fundamental nature of the stop not be changed unless the officer has specific and articulable facts. *Id.* at 233 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983) to the effect that "an investigative detention must be temporary and last no longer than is necessary . . . . Similarly, the investigative methods . . . should be the least intrusive means . . . to verify or dispel the officer's suspicion in a short period of time"). The Illinois Supreme Court's rule serves to restrain overreaching by police officers, and limits the potential for discriminatory application of the laws.

Nonetheless, comparing *Caballes* to *People v. Harris*, 207 Ill.2d 515, 802 N.E.2d 219 (Ill. 2003), decided the same day, makes it clear that duration is a critical component in the case below. The court in *Harris* concluded that there was no problem with the duration of the stop, but held that, when the officer proceeded to do a warrant check on a passenger in a vehicle pulled over for a minor traffic violation, the fundamental nature of the traffic stop impermissibly changed. The court cited *Gonzalez*, which had forbidden police officers from parlaying a traffic stop into a drug investigation. By contrast, in *Caballes* the court both explicitly (Pet. App. 5a) and implicitly relied on duration, and its failure to cite either *Gonzalez* or *Harris* further suggests that *Caballes* stands principally as a duration case.

Moreover, petitioner has not petitioned for certiorari to examine whether law enforcement officers can change the

the facts of this case, petitioner's reluctance is understandable—the court's decision below is amply supported by a duration analysis. As a consequence, this case would make a poor vehicle to explore whether the Fourth Amendment prohibits law enforcement authorities from changing the nature of the investigation after a traffic stop independently of prolonging the seizure itself.

In any event, no matter how construed, there is nothing in the opinion that indicates that the Court below concluded that a canine-sniff was a search under the Fourth Amendment. The Court tellingly never stated that a canine-sniff was a search, and relied on *Cox*, which similarly also never held that a canine-sniff was a search. Furthermore, the court below never cited *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), or *Place*, in its decision. The omission of these cases—or, indeed, of any case analyzing whether a dog-sniff is a search—strongly suggests that petitioner's characterization of the Court's opinion is erroneous.

In sum, this case does not present the opportunity to decide whether a canine-sniff is a search. No reasonable reading of the Court's opinion supports petitioner's construction, and the court's reliance on *Cox* undermines any such notion.

Rather, the Court's decision below represents a fact-based inquiry into whether the police officer's extension of the stop violated the Fourth Amendment. There is no disagreement among the lower courts that the *Terry* standard governs such cases. Given the particular facts at hand suggesting delay—the questioning, the criminal background check, additional questioning, and an unrelated call—reviewing this case is unlikely to provide any clarification of application of the *Terry* standard that would aid lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(4)

No. 03-923

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROY I. CABALLES, RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's opposition misinterprets both the decision below and the petition itself. Respondent initially suggests (incorrectly) that the Illinois Supreme Court held that the Fourth Amendment was violated when police extended the *duration* of a traffic stop to allow a canine sniff. Opp. 4. Respondent then asks this Court to ignore the Illinois Supreme Court's actual ruling — that the police impermissibly changed the *scope* of the stop by introducing a drug-detection dog — because the Court's Fourth Amendment ruling "can be justified on the basis of the extended duration of the seizure." Opp. 10. Finally, respondent mischaracterizes the petition as suggesting that the Illinois Supreme Court held that a dog sniff was a Fourth Amendment search. Respondent's analysis of both the petition and the decision below is flawed, and he utterly fails to undermine the petition's showing that certiorari should be granted.

A. The petition establishes that the courts are deeply and intractably split over whether the Fourth Amendment requires reasonable suspicion to justify using a drug-detection dog during the course of a legitimate traffic stop. Pet. 6-7. Respondent answers in a footnote, stating that "[t]here is no basic conflict among the courts of appeal as to whether prolonging the duration of a seizure after a traffic stop violates the Fourth Amendment." Opp. 8.

That, of course, begs the question. The Illinois Supreme Court did not find a Fourth Amendment violation based upon any analysis of whether the canine sniff extended the *duration* of the stop. Rather, it held that the canine sniff impermissibly extended the *scope* of the stop. Pet. App. 4a-5a ("the police impermissibly broadened the *scope* of the traffic stop in this case into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff")

(emphasis added). It is that question on which the courts have irreparably split. Pet. 6-7.

Faced with this undeniable reality, respondent suggests that the Illinois Supreme Court used the term "scope" to mean both the duration of the stop and the nature of the investigation. Opp. 4-5. That suggestion is frivolous, as shown by the very case cited by respondent in support of his position. See *People v. Cox*, 202 Ill.2d 462, 469-471, 782 N.E.2d 275, 280-281 (2002) (analyzing separately the duration and scope of the stop), cert. denied, 123 S. Ct. 2574 (2003).

Finally, respondent speculates that this is a duration case, not a scope case, because "[t]he court below may well have concluded that the officer was stalling to permit the canine unit more time to arrive." Opp. 7. There is no need to speculate about what the Illinois Supreme Court *may well* have concluded, as the court's reasoning was articulated for all to see. As noted above, the reasoning rested exclusively upon what the court viewed as the extended scope of the stop, not its (supposed) prolonged duration.

B. Contrary to respondent's suggestion (Opp. 6), the question presented here is not whether a dog sniff is a search. The Illinois Supreme Court did not hold that a dog sniff is a Fourth Amendment search. Rather, as the petition correctly noted, the court below held that a canine sniff, performed without reasonable suspicion, enlarged the scope of a routine traffic stop into a drug investigation. Pet. App. 5a.

Respondent does little to defend that holding on the merits. But even if he had, there remains the intractable split among the courts on the question presented — a split that warrants this Court's intervention.

C. Respondent argues that this case is not important because the decision below (supposedly) was based on the

duration of the stop. Opp. 12. Respondent fails to acknowledge the frequency with which police officers and courts address this issue. Pet. 9-10. He also fails to acknowledge that the use of drug-detection dogs has resulted in over 130,000 narcotics seizures worth several billions of dollars. Brief of the Illinois Association of Chiefs of Police and Major Cities Chiefs Association as *Amici Curiae*, at 5. There can be no doubt that the question presented is important and recurring.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 03-923

In the Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROY I. CABALLES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Illinois Association of Chiefs of Police ("IACP") is a voluntary professional organization comprised of over 800 members from jurisdictions across Illinois. Those jurisdictions include law enforcement executives from large urban centers employing thousands of police officers, to small, rural municipalities with only a few officers. Most IACP members are active members of law enforcement, many of whom maintain canine programs within their jurisdictions and utilize canine assets to enhance investigatory and enforcement activities within legal parameters. In addition, IACP members include legal advisors who counsel law enforcement officers and administrators on such issues, including the formulation of policy on the subject. IACP members are committed to the best interests of their respective communities and the law enforcement profession.

The Major Cities Chiefs Association ("MCC") is a professional organization of police executives representing the 59 largest cities or jurisdictions in the United States and Canada. Representation in the United States exceeds 200,000 law enforcement personnel serving a population in excess of 47 million. The MCC provides a forum for urban police chiefs, sheriffs, and other law enforcement chief executives to discuss common problems, share information and problem-solving strategies, and articulate the public safety needs of large cities in the formulation of criminal justice policy. The MCC is dedicated to the advancement of research, legislation, policy and programs that ensure the safety of our citizens and the officers that protect them.

Because of the direct relationship between IACP and MCC members and the daily activities of law enforcement across the United States, amici have firsthand

knowledge of the practical impact of the Illinois Supreme Court's ruling in this case, and are therefore in a unique position to impart their knowledge to this Court. The IACP and the MCC believe that their views will aid this Court in the resolution of the issues raised in the petition for writ of certiorari.[1] The consent of the parties has been obtained and written consents are being filed with the Court.

SUMMARY OF ARGUMENT

The Illinois Supreme Court's opinion undercuts a valuable tool in the war on drugs through a misunderstanding of the permissible scope of police activity during a traffic stop and a misapplication of *Terry v. Ohio*, 392 U.S.1 (1968). The decision further undercuts this Court's determinations that canine sniffs during traffic stops do not implicate the fourth amendment because they do not constitute searches requiring probable cause or articulable suspicion. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983). Moreover, the lower court's opinion contravenes *Whren v. United States*, 517 U.S. 806 (1996), which permits officers to utilize traffic violations as a means of investigating possible illegal drug activity.

In the instant case, the canine sniff was conducted during a vehicle stop which was supported by probable cause. The canine sniff did not extend the duration of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the IACP or the MCC, their supporters, and their counsel, made a monetary contribution to the preparation and submission of this brief.

the stop. On the contrary, the canine sniff of the exterior of the vehicle was completed in less than a minute and prior to the completion of the warning citation for the initial stop. The use of the canine to conduct the sniff of the vehicle was simply an additional investigative process applied to a vehicle properly stopped for a traffic violation.

There is no sound basis for the view that police who have probable cause to make a traffic stop are precluded by the fourth amendment from utilizing the range of investigative aids at their disposal where those practices do not constitute a search or otherwise extend the period of detention. In addition to its impact on the war on drugs, such a construction of the fourth amendment threatens to undermine the government's war on terror, which relies on canines to sniff vehicles and luggage for narcotics and explosives at large gatherings or at transportation centers such as our nations' airports.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS SUPREME COURT'S DECISION IMPERMISSIBLY GRAFTS A RIGHT TO BE FROM CRIMINAL INVESTIGATION ONTO THE FOURTH AMENDMENT

The Illinois Supreme Court's announcement of a fourth amendment right to be free from canine sniffs during vehicle stops without even acknowledging the existence of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983) is striking evidence of the opinion's unsoundness. Though this Court held in *Place* and *Edmond* that canine sniffs on luggage and vehicles do not constitute searches

triggering fourth amendment protections, the lower court erroneously relied on *Terry v. Ohio*, 392 U.S.1 (1968), which had nothing to do with either canine sniffs or the application of general investigative procedures, for the proposition that police must possess reasonable suspicion of criminal activity before they may conduct any kind of criminal investigation, including a canine sniff, during a traffic stop.

The Illinois Supreme Court's application of a reasonable suspicion standard to canine sniffs conducted during traffic stops impermissibly grafts an unprecedented right to be free from criminal investigation onto the Fourth Amendment. This significant limitation on law enforcement crime fighting tools is unjustified because the use of such dogs, under the circumstances of the instant case, did not constitute a search, did not prolong the stop, and did not, therefore, implicate the Fourth Amendment.

Police narcotics detection dogs serve law enforcement as a valuable tool in connection with the effort to stem the tide of illegal narcotics flowing into and within our nation through its airports, borders, interstate highways, and city streets. Alth' ugh complete statistics on the use and effectiveness of canines by law enforcement are not readily available, in the opinion of the amici, canine sniffs such as that used in the instant case are critical to effective law enforcement. In the experience of our members there have been countless occasions where dangerous contraband has been discovered though the use of canines. The Illinois Supreme Court decision would dramatically limit the ability of law enforcement to employ canines, unnecessarily impairing narcotics enforcement efforts.

While there is a lack of comprehensive data on use of canines at the local level in the recovery of narcotics, the

experiences of the federal government in using canines illustrates their value as investigative tools. For example, the federal customs service has been utilizing canines for over 30 years with remarkable success. As the United States Customs and Border Protection website indicates, the use of canines has resulted in over 130,000 drug and narcotics seizures. This represents the confiscation of narcotics with an estimated street value of several billions of dollars. *See* U.S. Department of Homeland Security, U.S. Customs and Border Protection, Canine Enforcement Program, Website http://www.cbp.gov/xp/cgov/enforcement/canines/canine_program/canine/xml (January 28, 2004). Moreover, our members have observed that with the increasing sophistication of criminals in concealing narcotics in traps installed in passenger vehicles the use of canines to detect drug contraband is growing even more important.

While canines are a highly effective investigative tool in alerting law enforcement to the presence of narcotics and dangerous contraband, they are employed with minimal intrusion on the privacy rights of individuals. When properly trained, the dogs' heightened sense of smell allows them to detect specified narcotics without entering or rummaging through the vehicle. As a result, none of the contents are disturbed or otherwise revealed. Unless the dog alerts on the vehicle, the government never obtains any information about the owner's property or the contents of the vehicle. In our experience canine sniffs of vehicles are accomplished in minutes or seconds. The inconvenience to the vehicle occupants is minimal.

Conceptually, walking a dog around a vehicle is precisely analogous to an officer walking around the car and making observations, with the key exception that

a canine's heightened sense of smell allows it to pick up the scent of narcotics inside a trunk where a human being could not. No one would seriously dispute that an officer who smells marijuana coming from a vehicle while talking to a driver during a traffic stop possesses probable cause to take further action. The walking of a canine around the car does not invade the driver's privacy any more than does a police officer walking around the car. The mere fact that a canine's observations are more effective than a human's because of its heightened sense of smell should have no consequences in terms of the application of the fourth amendment.

Given the *de minimus* nature of any privacy intrusion, the lower court's reliance on *Terry* for the proposition that reasonable suspicion must accompany canine sniffs was unsound. If, as this Court held in *Place* and *Edmond*, a canine sniff is not a search, then neither *Terry* nor any of the Court's other precedents supports the application of any standard of suspicion to the government's use of the canine. Indeed, *Terry*'s application of a reasonable suspicion standard to frisks for weapons acknowledged that a frisk is a search, though not as intrusive as other searches for which the Court has always required probable cause. Here, the use of a canine is not a search, and therefore, the fourth amendment is not implicated.

While *Terry* requires investigative detentions, which are seizures, and weapons frisks, which are searches, to be premised on reasonable suspicion, neither *Terry* nor any of the Court's subsequent cases support the notion that every police action which does not qualify as a search or seizure during a traffic stop must be independently examined for reasonableness. To the contrary,

Terry only contemplates that conduct which extends the length or alters the character of the stop (i.e., the use of handcuffs) be analyzed to determine whether the stop, at some point, ripened into an arrest requiring probable cause. In this case, however, there is no contention that walking the canine around the car in any way prolonged the stop or constituted an arrest. Thus, by subjecting this simple investigative tool to a reasonable suspicion standard, the Illinois Supreme Court has impermissibly grafted a general right not to be investigated onto the Fourth Amendment.

II. THE LOWER COURT'S OPINION IMPERMISSIBLY GUTS DRUG INTERDICTION PROGRAMS WITHOUT JUSTIFICATION AND IN CONTRAVENTION OF WHREN V. UNITED STATES

The Illinois Supreme Court's rejection of canine sniffs during traffic stops contravenes this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), which upheld the viability of pretextual traffic stops under the Fourth Amendment. The *Whren* Court explained that, so long as an officer possesses reasonable suspicion of a traffic violation, he may stop a vehicle even if his true purpose is to investigate whether the driver is involved in illegal drug activity. Of course, any such stops remain subject to constitutional scrutiny under the equal protection clauses if police exercise their discretion to stop vehicles on the basis of race or other class based animus. *Id.*; *See also United States v. Armstrong*, 517 U.S. 456 (1996).

In reliance on *Whren*, many police agencies, including the Illinois State Police (ISP), have implemented drug interdiction programs, which actively utilize traffic stops

as a means of developing reasonable suspicion of illegal drug activity, in order to combat the use of interstate highways for illegal narcotics trafficking. *See Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) (rejecting racial profiling challenge to ISP's "Operation Valkyrie" drug interdiction program). These programs utilize a variety of tools in order to develop reasonable suspicion and probable cause of drug activity. The ISP's drug interdiction program trains officers to use both observation and conversation in an effort to determine whether a driver is transporting illegal narcotics. *Id.* at 621-22. An officer is trained to look for a host of potential indicators, including citizen band's radios, tinted windows, radar detectors, perfumes, duct tape, pagers, missing dashboard screws, missing handles and door knobs, and zippered bags.[2] While the presence of such indicators, either individually or in combination, may well be entirely innocent, they may also be indicators of illegal drug activity.

Officers are further trained to engage the occupants of the vehicle in consensual small talk, focusing on the purpose of the trip, points of origin and destination, and length of stay, as well as any explanations for the vehicle owner's absence, and information about where and when a vehicle was leased. Officers are advised to look for a subject's refusal or reluctance to answer,

[2] Other potential indicators are religious paraphernalia (sometimes utilized to divert suspicion), inability to roll windows all the way down (suggesting doors may contain contraband), high odometer mileage, especially in late model vehicles, switches and buttons (may activate electronic compartments), large sums of cash, attorney cards, drug paraphernalia, hiding places, weapons, one key rings, maps showing drug source cities, rented vehicles, cashier's checks, and bondo on the vehicle.

answering a question with his own question, unusual voice inflections or cracking, sighing, throat clearing, or yawning. Other potential indicators include the use of words and phrases such as "honestly", "truthfully", "I swear", etc. Officers are further trained to look for a host of signs and stress on subjects of vehicle stops, including blushing, turning pale, shaking, avoiding eye contact, repeated touching of the face, grooming, sweating, fidgeting, and nervous gestures. Again, such answers and idiosyncracies might well be innocent, or they might be indicative of a fear of being caught with illegal contraband.

A primary tool an officer possesses to distinguish between innocent reactions and criminally culpable behavior is the trained narcotics detection dog. While an officer is writing a ticket or issuing a warning for the traffic violation, he may ask that a drug detection dog be brought to the scene to walk around the vehicle to determine whether the smell of designated illegal contraband is escaping the vehicle. If the dog fails to alert during its brief walk around the car,[3] the driver is sent on his way without the officer ever having learned anything further about the contents of the vehicle. Only when the officer's suspicions are confirmed through an alert does the investigation continue.

The Illinois Supreme Court's application of *Terry*'s scope requirement to each and every aspect of an officer's conduct during a traffic stop effectively dismantles drug interdiction programs and dismisses *Whren* without justification. Though *Whren* unanimously upheld pretextual stops against fourth amendment challenge,

[3] In this case, the dog alerted to the drugs in the vehicle in less than one minute.

the Illinois Supreme Court has inconsistently concluded that the driver of a vehicle properly stopped for a traffic violation cannot then be investigated for possible drug activity. Under the lower court's approach, every question an officer asks during the stop must be independently analyzed for a determination of whether it was reasonably related to the underlying purpose of the stop.[4] Thus, most of the questions utilized by officers seeking to determine whether a driver might be transporting drugs would, under the lower court's view, violate the Fourth Amendment, and require the suppression of any evidence seized as a result of information developed from the driver's answers or reactions to those questions. Similarly, under the lower court's view, a police officer would violate the Fourth Amendment simply by asking a driver for consent to search the vehicle[5], since such a question will ordinarily be unrelated to the purposes of a stop for speeding or some other violation of a vehicle code.

In the instant case, the lower court dismissed the officer's observations of an air freshener and atlas, the

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[4] Indeed, the Illinois Supreme Court held, in *People v. Bunch*, 207 Ill.2d 7, 796 N.E.2d 1024 (2003), *petition for cert. filed* 72 USLW 3393 (November 19, 2003) that every question asked of a passenger during a traffic stop, including "what's your name" and "Where you (sic) coming from", is subject to fourth amendment scrutiny under *Terry*'s scope requirement. Subsequently, on the same day the instant case was decided, the Illinois Supreme Court held that a police officer violated *Terry*'s scope requirement simply by checking a passenger's identification card for outstanding warrants. *People v. Harris*, 207 Ill.2d 515, ___ N.E.2d ___ (2003).

[5] Drug Interdiction officers are also trained to request consent in connection with traffic stop based investigations of drug trafficking.

driver's nervousness, his choice of business attire for a cross country trip, and the absence of personal belongings in the car despite the driver's statement that he was moving to Chicago. The downplaying of these observations aptly illustrates the damage to drug interdiction programs attendant to the lower court's decision. Indeed, the lower court was correct that the observations identified by the officer could just as well be innocent as culpable, though they were confirmed in this case when the dog alerted to a large quantity of illegal narcotics. Nonetheless, the possibility that an officer might be misinterpreting wholly innocent behavior argues in favor of, rather than against, the use of canine sniffs as a means of confirming or dispelling suspicions without any significant intrusion on privacy interests.

Contrary to the implication in the lower court's analysis, the fourth amendment was never intended to level the playing field between law enforcement and criminals. It was not intended to give criminals a fair chance to avoid detection if they are careful to conceal their contraband. To the contrary, the fourth amendment was only intended to protect the government from invading individuals' reasonable expectations of privacy in their zeal to fight crime. Thus, if the government is able to develop effective tools such as highly trained canines for detecting criminal behavior without unreasonably detaining or searching its citizens, then the fourth amendment affords criminals no relief.

Canine sniffs enjoy great success because some criminals do not bank on the fact that contraband within their vehicles emits odors which can be detected by a dog simply walking around the car. On the other hand, many more knowledgeable potential drug traffickers

presumably choose not to transport drugs through our nations' highways and streets because of fear of detection by canines. The lower court's view that *Terry* prohibits canine sniffs, all investigative questioning, and computer checks on passenger identification, unless an articulable suspicion of criminality exists, sends a message to drug dealers that so long as they are careful to conceal their contraband and not affirmatively tip off the police, their drugs will be safe from detection, even when they are lawfully detained by law enforcement for traffic violations. It is anomalous to permit limit law enforcement to utilize pretextual stops for the purpose of investigating drug activity, as in *Whren*, and then rely on *Terry* to deprive them of the right to conduct any investigation once the vehicle is stopped.

Finally, any suggestion that sanctioning the use of canines during traffic stops will contribute to the creation of a police state in which citizens are routinely subjected to dog sniffs would be unavailing. As this Court recently noted in the context of informational checkpoints, such a concern is overblown given that police manpower and resources are limited. *Illinois v. Lidster*, ___ U.S. ___, 124 S.Ct. 885 (2004). In the present context, our members advise that those same limitations prevent law enforcement from training enough qualified handlers and dogs to allow a substantial proliferation of the use of canines. Indeed, we are advised that only a very small percentage of canine applicants are even accepted into the rigorous canine training programs.

Moreover, the use of canines during traffic stops can still violate the fourth amendment if they unnecessarily prolong the detention. That significant limitation makes it feasible for police to use a canine on a traffic stop only when a canine is already present in reasonable proximity to the scene of a particular stop. As a result, there is little reason to fear that dogs will soon be prowling our nations' highways sniffing every stopped vehicle.

III. NARROW LIMITS ON CANINE SNIFFS ADVERSELY IMPACT OTHER IMPORTANT LAW ENFORCEMENT INTERESTS

Amici believe that other weighty law enforcement interests are also threatened by the Illinois Supreme Court's limitation on the use of canine sniffs in the absence of articulable suspicion of criminality. Specifically, our members advise that in the arena of homeland security, canine sniffs for explosives are an important anti-terrorism tool established at the direction of the federal government. Canines have had a longstanding role in the area of transportation security. They are able to scan vehicles and luggage for explosives or narcotics in a fraction of the time and with far less intrusiveness than humans rummaging through belongings and utilizing other man-made scanning technologies. Moreover, the mere public presence of canines at transportation centers serves to enhance public confidence in the safety of the transportation system as well as deter against terrorist threat.

As threats from large improvised explosive devices placed in vehicles increase, the use of canines to conduct assessments of stopped vehicles will continue to grow. Our members indicate that canines are routinely used in parking facilities and roadways adjoining airport facilities to look for explosives.

The federal government clearly recognizes the important role canines can play in ensuring the safety of transportation centers like airports. The United States Department of Homeland Securities, Transportation Security Administration is currently funding local law enforcement to increase canine teams to be used at airports. In addition to use in terminals these canines are also used by local law enforcement during heightened security alerts to search parking areas and approaching vehicles on roadways. The continued viability of such important practices are threatened by the Illinois Supreme Court's interpretation of the fourth amendment.

In all respects the use of canines at transportation hubs are minimally intrusive while serving compelling public interests. They are of short duration and limited intrusiveness-designed only to detect explosives or narcotics. They do not expose any of a citizen's belongings to scrutiny or rummaging so long as the dog does not alert on contraband contained within. The dogs at transportation hubs are highly visible and thus serve an important deterrence effect. Though this Court's decision in *Place* would seem to sanction such programs, the lower court's decision in this case places them on uncertain footing in Illinois.

CONCLUSION

For the reasons discussed herein and in the Petition for Writ of Certiorari, amici respectfully request that this Honorable Court grant the petition, reverse the decision of the Illinois Supreme Court, and hold that on the basis of its precedent and sound judicial policy, the canine sniff in this case did not violate the Constitution.

Respectfully submitted,

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v.

ROY I. CABALLES, RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-10a) is reported at 207 Ill. 2d 504, 802 N.E.2d 202 (2003). The judgment of the Appellate Court of Illinois, Third District, is reported at 321 Ill. App. 3d 1063, 797 N.E.2d 250 (2001) (Table), and the opinion of that court (Pet. App. 11a-19a) is unreported. The oral ruling of the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois (Pet. App. 20a-27a), is unreported.

JURISDICTION

The Supreme Court of Illinois entered judgment on November 20, 2003. The petition for a writ of certiorari was filed on December 18, 2003, and granted on April 5, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a bench trial, respondent was convicted of one count of cannabis trafficking. The Illinois Appellate Court

affirmed. The Illinois Supreme Court reversed, holding that the use of a drug-detection dog during the legitimate traffic stop of respondent's vehicle violated the Fourth Amendment because the police had no reasonable suspicion that the vehicle contained illegal drugs.

1. On November 12, 1998, Trooper Daniel Gillette stopped respondent for speeding. Gillette informed the police dispatcher by radio that he was making the stop. Trooper Craig Graham, of the Illinois State Police Drug Interdiction Team, heard the radio transmission and told the dispatcher that he was going to meet Gillette and conduct a canine sniff. Pet. App. 1a.

Trooper Gillette approached respondent's car, informed him that he was speeding, and asked for his driver's license, vehicle registration and proof of insurance. Respondent complied. Gillette then instructed respondent to reposition his car on the shoulder of the road so that it would be out of traffic, and to come to the squad car because it was raining. Respondent again complied. *Id.* 2a.

Once Trooper Gillette and respondent were seated in the squad car, Gillette told respondent that he was going to write a warning ticket for speeding. Gillette then called the police dispatcher to determine whether respondent's license was valid and to check for outstanding warrants. The dispatcher reported that respondent had surrendered his Illinois license to Nevada, and two minutes later confirmed that his Nevada license was valid. After receiving this confirmation, Gillette asked the dispatcher for respondent's criminal history. *Ibid.*

Trooper Gillette then asked respondent for consent to search his vehicle, and respondent refused. Gillette next asked respondent if he had ever been arrested, and respondent said no. Shortly thereafter, the dispatcher reported that respondent had two prior arrests for distribution of marijuana. *Ibid.*

While Trooper Gillette was writing the warning ticket, Trooper Graham arrived with a drug-detection dog and began walking around respondent's car. Less than one minute later, while Gillette was still writing the ticket, the dog alerted at the trunk. After being advised of the alert, Gillette searched the trunk and found marijuana. Respondent was arrested and charged with one count of cannabis trafficking. *Id.* 2a-3a, 13a.

2. Respondent moved to suppress the marijuana and to quash his arrest. The trial court denied the motion (Pet. App. 20a-27a) and, following a bench trial, found respondent guilty of cannabis trafficking. Respondent was sentenced to twelve years in prison and ordered to pay a street value fine of $256,136. The Illinois Appellate Court affirmed. *Id.* 11a-19a.

3. In a four-to-three decision, the Illinois Supreme Court reversed. Pet. App. 1a-10a. To determine the validity under the Fourth Amendment of the canine sniff, the majority applied the two-part test of *Terry v. Ohio*, 392 U.S. 1 (1968), "(1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Pet. App. 4a (citation and internal quotations omitted). The majority found that the traffic stop was justified at its inception, but concluded that the troopers "impermissibly broadened the scope of the traffic stop" by using the drug-detection dog to sniff respondent's car. *Ibid.*

In so concluding, the majority relied heavily upon *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275 (2002), cert. denied, 539 U.S. 937 (2003). The police in *Cox* pulled over the defendant's vehicle because it did not have a rear registration light. *Id.* at 464, 782 N.E.2d at 277. A drug-detection dog was brought to the scene and alerted to the presence of drugs. *Ibid.* The trial court suppressed the evidence, and the Illinois Appellate Court affirmed. *Id.* at 465, 782 N.E.2d at 277-278. Applying *Terry*

principles, the Illinois Supreme Court affirmed on two separate grounds. First, the court held that the police had improperly extended "the duration of the traffic stop" in order to allow the drug-detection dog to arrive from elsewhere. *Id.* at 469-470, 782 N.E.2d at 280. Second, putting aside duration, *Cox* held that because the sniff broadened the scope of traffic stop, it would have been permissible only if "specific and articulable facts" suggested that the defendant's vehicle contained drugs. *Id.* at 470-471, 782 N.E.2d at 280-281.

In this case, the majority did not find that the troopers had extended the duration of respondent's traffic stop. Rather, relying exclusively upon *Cox*'s second holding, the majority held that the troopers broadened the scope of the stop into a drug investigation, and that they had no "specific and articulable facts to support the use of a canine sniff." Pet. App. 4a-5a. Accordingly, the majority concluded that "the trial court should have granted [respondent]'s motion to suppress based on the unjustified expansion of the scope of the stop." *Id.* 5a.

Joined by Justices Fitzgerald and Garman, Justice Thomas dissented. The dissent criticized the majority for failing to acknowledge *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983), which establish that a canine sniff is not a search under the Fourth Amendment. Pet. App. 7a. Because a canine sniff is not a search, the dissent concluded that "the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it." *Id.* 10a.

Justice Thomas explained that the rule of law set down by the majority — that a canine sniff must be justified by a reasonable suspicion that the vehicle contains illegal drugs — has no conceivable basis in precedent. The dissent noted that if a canine sniff is a search, it must be supported by probable cause, but if a sniff is not a search, it requires no independent justification. *Ibid.* By holding that canine sniffs must be

justified by reasonable suspicion, the majority created an untenable "middle ground," improperly extending *Terry* to searches for incriminating evidence and erroneously equating canine sniffs with *Terry* investigative stops. *Ibid.* The dissent concluded that the majority's ruling "is wholly incompatible with United States Supreme Court case law construing the fourth amendment and is subject to reversal by that court." *Ibid.*

4. Illinois filed a timely petition for certiorari, which was granted. 124 S. Ct. 1875 (2004).

SUMMARY OF ARGUMENT

The Fourth Amendment does not require police to have reasonable suspicion that illegal drugs are present before using a drug-detection dog to sniff the exterior of a vehicle during a legitimate traffic stop. Because the sniff is not a Fourth Amendment search, it requires no independent justification when conducted on a vehicle that has already been detained following an observed traffic violation. That is, a traffic stop justified by probable cause does not lose its legitimacy when a canine sniff occurs during the stop.

In holding otherwise, the Illinois Supreme Court failed to acknowledge settled precedent establishing that canine sniffs are not Fourth Amendment searches. Instead, scrutinizing the sniff of respondent's car under the *Terry* doctrine, the majority invalidated the sniff upon concluding that the officers did not have reasonable suspicion that illegal drugs were present. The majority's analysis erred in two respects. First, the *Terry* doctrine does not govern traffic stops justified by probable cause or canine sniffs that occur during such stops. Second, even if the *Terry* doctrine applied, the sniff of respondent's car still was lawful under the Fourth Amendment because it did not entail any additional intrusion on respondent's legitimate privacy or possessory interests.

ARGUMENT

I. The Fourth Amendment Does Not Require Reasonable Suspicion To Use A Drug-Detection Dog To Sniff The Exterior Of A Vehicle During A Traffic Stop Justified By Probable Cause.

We begin with a matter that the majority below did not address: the status of canine sniffs under the Fourth Amendment. Settled precedent holds that a sniff by a drug-detection dog, in and of itself, is not a search. Given this premise, it does not violate the Fourth Amendment to conduct a canine sniff on the exterior of a vehicle during a traffic stop justified by probable cause.

In *United States v. Place*, 462 U.S. 696 (1983), an officer subjected the defendant's luggage to a canine sniff. *Id.* at 698-699. The dog alerted to the luggage, which later was found to contain cocaine. *Id.* at 699. In considering defendant's challenge to his conviction, this Court noted that if a canine sniff were a Fourth Amendment search, then the seizure of the luggage "could not be justified on less than probable cause." *Id.* at 706. The Court concluded, however, that a sniff by a drug-detection dog is not a search:

> The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy. * * * A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a

> contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Id. at 707. After stating that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," the Court held that a canine sniff in a public place "d[oes] not constitute a 'search' within the meaning of the Fourth Amendment." *Ibid.*

The Court has never questioned *Place*'s holding that canine sniffs are not searches. See *Soldal v. Cook County, Illinois*, 506 U.S. 56, 63 (1992) (noting that *Place* held "that subjecting luggage to a 'dog sniff' did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest"); *United States v. Jacobsen*, 466 U.S. 109, 123-124 (1984) (same); see also *Kyllo v. United States*, 533 U.S. 27, 47 (2001) (Stevens, J., dissenting) ("in [*Place*], we held that a dog sniff that discloses only the presence or absence of narcotics does not constitute a search within the meaning of the Fourth Amendment") (internal quotations and citations omitted); *Bond v. United States*, 529 U.S. 334, 341 (2000) (Breyer, J., dissenting) (noting "the accepted police practice of using dogs to sniff for drugs hidden inside luggage").

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court expressly reaffirmed *Place* with respect to canine sniffs of the exterior of a vehicle. *Edmond* considered a challenge to a drug-interdiction checkpoint where vehicles were subjected to a sniff by a drug-detection dog. The Court concluded that the checkpoint violated the Fourth Amendment because it was suspicionless and undertaken for an improper primary purpose.

Id. at 41-44; see also *Illinois v. Lidster*, 540 U.S. ___, 124 S. Ct. 885, 888 (2004) ("*Edmond* involved a checkpoint at which the police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles.")

In so ruling, however, *Edmond* reaffirmed *Place*'s holding that use of a drug-detection dog to sniff the exterior of a vehicle is not a Fourth Amendment search:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. *The fact that an officer walks a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search.* See *United States v. Place*, 462 U.S. 696, 707 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is much less intrusive than a typical search. Rather, what principally [makes] these checkpoints [unlawful] is their primary purpose.

531 U.S. at 40 (emphasis added) (internal quotations and most citations omitted). Thus, the Fourth Amendment infirmity in *Edmond* was not that a dog sniff transformed a vehicular seizure into a search — the Court made clear that a sniff is not a search — but that the vehicles had been improperly seized in the first place. *Id.* at 40-44.

Because a sniff by a drug-detection dog is not a search, the Illinois Supreme Court erred in holding that reasonable suspicion is required to conduct a sniff of a vehicle already detained on probable cause that a traffic violation occurred. The reason is rooted in long-settled Fourth Amendment doctrine: When police officers, positioned at a lawful vantage point, discover

incriminating facts without conducting an additional search or seizure, the discovery causes no intrusion on privacy or security and therefore does not violate the Fourth Amendment. See *Minnesota v. Dickerson*, 508 U.S. 366, 374-375 (1993); *Horton v. California*, 496 U.S. 128, 133 n.5, 141 (1990); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *United States v. Hensley*, 469 U.S. 221, 235 (1985); *Michigan v. Long*, 463 U.S. 1032, 1050 (1983); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

Thus, if Trooper Gillette, when requesting respondent's license and registration, had seen a bag of cocaine or a handgun on the passenger seat, that visual observation would not have been a search and therefore would not have violated the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 808-809 (1996) (officer who pulled over vehicle for traffic violations observed bag of crack cocaine in driver's hands); *Hensley*, 469 U.S. at 224 (during investigatory stop of vehicle, officer observed butt of revolver protruding from underneath passenger's seat); *Long*, 463 U.S. at 1036 (during investigatory stop of vehicle, officer discovered bag of marijuana under arm rest). Likewise, if Trooper Graham, upon his arrival at the traffic stop, had smelled marijuana smoke coming from the passenger compartment or the scent of a corpse coming from the trunk, that olfactory observation would not have violated the Fourth Amendment. See 1 Wayne R. LaFave, *Search and Seizure*, § 2.2(a), at 403 (3d ed. 1996).

The same result obtains under the actual facts of this case. Because there was probable cause to stop respondent for speeding, Troopers Gillette and Graham were entitled to detain and approach respondent's car. The marijuana odors that caused the drug-detection dog to alert were present in the air surrounding the car. Respondent had no legitimate expectation of privacy in the air surrounding his car. See *New York v. Class*, 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does

not constitute a 'search.'"). He certainly had no legitimate expectation of privacy in the marijuana odors outside of his car. See *Jacobsen*, 466 U.S. at 123 ("[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"); *Place*, 462 U.S. at 707. Thus, the canine sniff of respondent's car entailed no intrusion — more specifically, no intrusion beyond that already effected by its lawful seizure — on respondent's legitimate privacy and possessory interests. See *Dickerson*, 508 U.S. at 375-376. For that reason, the sniff did not violate the Fourth Amendment.

Two considerations might be advanced to support a contrary result, but neither has merit. The first consideration is that Trooper Graham used a dog, rather than his own faculties, to detect the odor of marijuana outside respondent's car. This consideration could not be squared with *Edmond* and *Place*, which held, respectively, that "an exterior sniff of an automobile * * * is not designed to disclose any information other than the presence or absence of narcotics," 531 U.S. at 40, and that a canine sniff "disclos[ing] only the presence or absence of narcotics, a contraband item," invades no legitimate privacy interest, 462 U.S. at 707. See also Jacobsen, 466 U.S. at 123-124. Thus, it is of no Fourth Amendment moment that Trroper Graham used a *dog's* superior sense of smell, rather than his own, to detect the odor of marijuana outside of respondent's vehicle. Compare *Kyllo*, 533 U.S. at 38 (use of thermal imaging device "might disclose" intimate details of the home, such as "at what hour each night the lady of the house takes her daily sauna and bath").

It might also be argued that the sniff was unlawful because the dog's arrival at respondent's traffic stop was not inadvertent. See Pet. App. 4a ("In *Cox*, we concluded that evidence obtained by a canine sniff was properly suppressed because calling in a canine unit unjustifiably broadened the scope of an

otherwise routine traffic stop into a drug investigation.") (citing *Cox*, 202 Ill. 2d at 469, 471, 782 N.E.2d at 280-281). Such a consideration could not be squared with *Horton v. California*, *supra*. In *Horton*, a police officer searched the defendant's home pursuant to a warrant; the warrant authorized a search for rings stolen during an armed robbery, but not for the weapons used in the robbery. 496 U.S. at 130-131. While conducting the search, the officer discovered the weapons in plain view. *Id.* at 131. The defendant argued that the weapons should have been suppressed because the officer wanted to discover them. This Court disagreed, holding that the Fourth Amendment imposes no "inadvertence" requirement where the police discover incriminating evidence from a lawful vantage point without effecting any additional intrusion on the defendant's legitimate privacy interests. *Id.* at 141-142. Under *Horton*, it does not matter under the Fourth Amendment that Trooper Graham and his dog did not inadvertently stumble upon the scene of respondent's traffic stop.

For these reasons, conducting a canine sniff during the course of respondent's traffic stop did not violate the Fourth Amendment. The Illinois Supreme Court's contrary ruling should be reversed.

II. The Illinois Supreme Court Erred In Invoking *Terry* To Invalidate Canine Sniffs At Traffic Stops Justified By Probable Cause.

The foregoing provides all the grounds necessary to reverse the judgment below. We nonetheless proceed to address the Illinois Supreme Court's erroneous invocation of the *Terry* doctrine, which led it to hold that the Fourth Amendment requires reasonable suspicion that drugs are present to justify a canine sniff of the exterior of a vehicle during a traffic stop supported by probable cause.

In ruling that reasonable suspicion is required in this context, the majority below did not address the settled principle that a canine sniff is not a Fourth Amendment search. Pet. App. 7a (Thomas, J., dissenting) (criticizing majority for ignoring *Place* and *Edmond*); see also *Cox*, 202 Ill. 2d at 480-485, 782 N.E.2d at 285-288 (Thomas, J., dissenting) (same). Instead, the majority analyzed respondent's traffic stop as if it were a *Terry* stop, holding that reasonable suspicion was required to conduct the dog sniff because the sniff "broadened the scope of the traffic stop in this case into a drug investigation." Pet. App. 4a; see also *Cox*, 202 Ill. 2d at 466-471, 782 N.E.2d at 278-281 (same).* Finding the facts insufficient to establish reasonable suspicion that respondent was transporting illegal drugs, the majority held that the sniff violated the Fourth Amendment. Pet. App. 4a-5a; see also *Cox*, 202 Ill. 2d at 470-471, 782 N.E.2d at 280-281 (same).

The Illinois Supreme Court's application of *Terry* is erroneous in two separate respects. First, *Terry* does not govern a canine sniff of the exterior of a vehicle at a traffic stop supported by probable cause. Second, even if *Terry* applied, canine sniffs under those circumstances still would comport with the Fourth Amendment.

A. To support its application of *Terry* to traffic stops justified by probable cause, the Illinois Supreme Court relied upon its prior decision in *People v. Gonzalez*, 184 Ill. 2d 402, 420-422, 704 N.E.2d 375, 384 (1998), cert. denied, 528 U.S. 825 (1999). Pet. App. 3a-4a. *Gonzalez*, in turn, cited *Berkemer*

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* Likewise, in *People v. Harris*, 207 Ill. 2d 515, 802 N.E.2d 219 (2003), pet. for cert. pending, No. 03-1224, the Illinois Supreme Court invoked *Terry* in holding that reasonable suspicion is generally necessary to justify conducting a warrant check of a passenger during a traffic stop supported by probable cause. *Id.* at 521-531, 802 N.E.2d at 224-230.

v. McCarty, 468 U.S. 420, 439 (1984), *Michigan v. Long*, 463 U.S. 1032, 1047-1052 (1983), and *Pennsylvania v. Mimms*, 434 U.S. 106, 111-112 (1977), for the proposition that this Court "has extended the *Terry* principles to situations involving traffic stops in order to minimize the dangers faced by law enforcement officers during these encounters." 184 Ill. 2d at 422, 704 N.E.2d at 384. In a later case, the Illinois Supreme Court cited *United States v. Sharpe*, 470 U.S. 675, 682 (1985), for the same proposition. See *People v. Gonzalez*, 204 Ill. 2d 220, 226, 789 N.E.2d 260, 265 (2003) ("as a general rule, a fourth amendment challenge to the reasonableness of a traffic stop is analyzed under *Terry* principles") (citing *Sharpe*).

None of the four precedents cited by the Illinois Supreme Court supports the view that *Terry* governs police actions at traffic stops justified by probable cause. Both *Sharpe* and *Long* involved *Terry* stops of vehicles. See *Sharpe*, 470 U.S. at 677 (DEA agent made an "investigatory stop" of vehicle); *Long*, 463 U.S. at 1035 n.1 ("The court below treated this case as involving a protective search, and not a search justified by probable cause to arrest for speeding, driving while intoxicated, or any other offense."). Those two cases, which stand for the unremarkable proposition that *Terry* stops should be evaluated under *Terry*, cannot be read to hold that *Terry* governs traffic stops justified by probable cause.

Unlike *Sharpe* and *Long*, *Berkemer* considered a traffic stop supported by probable cause. The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" for purposes of the *Miranda* doctrine. 468 U.S. at 423. In the course of holding that such motorists are not "in custody" for *Miranda* purposes, *Berkemer* stated that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted).

The Illinois Supreme Court seized on this passage in concluding that *Terry* governs police action at all traffic stops, even those justified by probable cause. See *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384. In so doing, however, the court ignored the footnote immediately following that passage:

> No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

Berkemer, 468 U.S. at 439 n.29. Given this caveat, *Berkemer* does not support extending *Terry* to traffic stops justified by probable cause. If anything, *Berkemer* precludes such an extension. See *United States v. Childs*, 277 F.3d 947, 953 (7th Cir.) (en banc) ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29), cert. denied, 537 U.S. 829 (2002).

Pennsylvania v. Mimms, the fourth precedent cited by the Illinois Supreme Court to support its view that *Terry* governs traffic stops justified by probable cause, is equally unavailing. After stopping the defendant for driving with an expired license plate, the officer asked the defendant to step out of his car. *Mimms*, 434 U.S. at 107. As the defendant exited the car, the officer noticed a large bulge under his sport jacket, frisked him, and discovered in his waistband a revolver loaded with ammunition. *Ibid.* The Pennsylvania Supreme Court held that the officer's order to the defendant to step out of his car was an impermissible seizure. *Id.* at 107-108. This Court reversed, holding that the Fourth Amendment allowed the officer to require the defendant to exit his vehicle and to frisk him upon observing the bulge under his jacket. *Id.* at 108-112.

The Illinois Supreme Court was wrong to read *Mimms* as establishing that *Terry* governs traffic stops supported by probable cause. *Mimms* cited *Terry* for the commonsense proposition that police officers may take reasonable steps to protect their safety during a traffic stop. *Id.* at 109-112. The citation of *Terry* for that purpose did not equate probable cause-based traffic stops with *Terry* stops, and did not suggest that traffic stops justified by probable cause would be subject to the limitations imposed by *Terry* upon investigatory stops justified only by reasonable suspicion. Any doubt on this score is resolved by *Berkemer*, which, seven years after *Mimms*, cautioned that the factual similarity between ordinary traffic stops and *Terry* stops "of course do[es] not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer*, 468 U.S. at 439 n.29. *Berkemer* conclusively defeats the notion that *Mimms* extended *Terry* to traffic stops justified by probable cause.

Other facets of this Court's Fourth Amendment jurisprudence confirm that traffic stops supported by probable cause are not governed by *Terry*. The *Terry* doctrine requires that investigatory stops have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. ___, slip op. at 7 (2004); see also *Sharpe*, 470 U.S. at 683-688 (citing cases). By contrast, if there is probable cause to believe that a driver has committed a minor traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Hensley*, 469 U.S. at 228; see also *Hiibel*, slip op. at 9-10. Such fact-specific balancing is inappropriate when determining the validity of routine traffic stops supported by probable cause and of police conduct occurring at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren*, 517 U.S. at 817-819; see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

The incompatibility is particularly acute with respect to canine sniffs conducted during probable cause-based traffic stops. *Terry* permits police officers to briefly detain individuals to question them about suspected criminal activity and to pat them down for weapons. See *Dickerson*, 508 U.S. at 373. Due to the intrusive nature of a *Terry* stop — where the officer seeks information directly from, and can lay hands directly upon, the seized individual — the Fourth Amendment requires that such stops be justified by reasonable suspicion that criminal activity is afoot. See *Terry*, 392 U.S. at 20-22. During a canine sniff, by contrast, the car and its occupants are not touched by the dog or its handler, and the sought-after information is obtained without questioning anybody. Indeed, in finding that dog sniffs are not searches, the Court observed that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707. Thus, while the Fourth Amendment appropriately demands reasonable suspicion to justify the moderate intrusions that take place during *Terry* stops, there is no basis to similarly

restrain canine sniffs conducted on the exterior of vehicles that are already the subject of a lawful seizure.

For these reasons, the Illinois Supreme Court erred in using *Terry* principles to evaluate the canine sniff at respondent's traffic stop. This analytical error prompted the majority's incorrect conclusion that the sniff violated the Fourth Amendment. Evaluating the sniff under the appropriate doctrines (see Section I, *supra*) results in the conclusion that there was no Fourth Amendment violation.

B. Even if the *Terry* doctrine governed this context, the canine sniff of respondent's vehicle still would pass Fourth Amendment muster. This is so largely for the reasons set forth at pages 9-11, *supra*.

As noted above, when police officers from a lawful vantage point discover incriminating facts without conducting an additional search or seizure, the discovery does not violate the Fourth Amendment. This principle applies with equal force when an officer's vantage point is justified by *Terry*. See *Dickerson*, 508 U.S. at 374-375; *Hensley*, 469 U.S. at 235; *Long*, 463 U.S. at 1050.

In *Dickerson*, for example, this Court considered whether police officers may seize nonthreatening contraband detected by touch during a *Terry* weapons frisk. 508 U.S. at 373. The Court concluded that the Fourth Amendment permits such seizures, holding that the plain-view doctrine "has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Id.* at 375. The Court explained: "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Ibid.* The Court made clear that an object's "iden-

tify" or "incriminating character" is "immediately apparent" so long as it can be ascertained "without conducting some further search of the object." *Ibid.*

Here, Troopers Graham and Gillette had legitimate grounds to stop and approach respondent's car. The marijuana odors in the air surrounding the car were discovered without effecting any additional search, seizure or other intrusion on respondent's vehicle or his privacy or possessory interests. Thus, even if it were appropriate to scrutinize the canine sniff under the *Terry* doctrine, the sniff still did not violate the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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No. 03-923

IN THE

Supreme Court of the United States

ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, in the absence of any reasonable suspicion of drug activity, a police officer may bring a drug-detection dog to the scene of another officer's routine traffic stop in order to prospect for illegal drugs by having the dog sniff the trunk of the stopped car.

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IN THE

Supreme Court of the United States

No. 03-923

ILLINOIS,
Petitioner,
v.

ROY I. CABALLES,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1a-10a) is reported at 207 Ill. 2d 504, 802 N.E.2d 202. The opinion of the Illinois Appellate Court (Pet. App. 11a-19a) is unpublished, but the decision is noted at 321 Ill. App. 3d 1063, 797 N.E.2d 250 (table). The oral ruling of the Illinois Circuit Court (Pet. App. 20a-27a) is unreported.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. Trooper Daniel Gillette of the Illinois State Police stopped respondent Roy Caballes for driving 71 miles per hour on a portion of Interstate 80 where the speed limit was 65. Pet. App. 1a. Gillette notified the police dispatcher of the stop and asked the dispatcher to run a check on the car's license plates. *Id.* at 1a, 12a. Hearing about the stop on the police radio, Trooper Craig Graham of the state police Drug Interdiction Team "immediately started for the scene with his drug-sniffing dog." *Id.* at 12a. Although Gillette had not requested assistance, Graham's action was not unexpected. To the contrary, although the stated reason for the stop had nothing to do with drug activity, Gillette expected Graham to show up, because that was his "responsibility as part of the team." *Id.*

Meanwhile, Gillette approached Caballes's car, told him that he had been speeding, and asked for his license, registration, and proof of insurance. Pet. App. 2a. He then told Caballes to move his car out of the way of traffic and to come sit in Gillette's car. *Id.* Once Caballes was in the police car, Gillette told him that he was only going to issue a warning ticket. *Id.* Gillette then asked the police dispatcher to check the validity of Caballes's license and whether there were any outstanding warrants for his arrest. *Id.*

While he waited to hear from the dispatcher, Gillette asked Caballes about his destination and attire, and Caballes responded. Pet. App. 2a. After the dispatcher reported that Caballes's Nevada license was valid and that there were no outstanding warrants, Gillette requested a criminal history check. *Id.* at 2a, 13a. He then asked Caballes for permission to search Caballes's car, but Caballes declined to consent. *Id.* at 2a. Gillette also asked whether Caballes had ever been arrested, and Caballes said no. *Id.* The dispatcher later reported that Caballes had been arrested twice for distribution of marijuana.

Gillette then began writing the warning ticket. Pet. App. 2a. He was interrupted, however, by another officer calling him on the radio on an unrelated matter. *Id.* at 2a-3a.

Gillette testified that he was still writing the ticket when Graham arrived and began walking his dog around Caballes's car. *Id.* at 3a. The dog alerted at the trunk. *Id.* Gillette then searched the trunk and found marijuana. *Id.*

2. a. Caballes moved to suppress the evidence found by opening his trunk and to quash the resulting arrest. Pet. App. 3a. The trial court denied the motion, concluding that the traffic stop and detention were proper; that Gillette did not unreasonably prolong the stop; and that the dog's alert was reliable enough to provide probable cause to search the trunk. *Id.* at 3a, 14a, 21a-26a. After a bench trial, the court found Caballes guilty of trafficking in marijuana. *Id.* at 3a.

b. The Illinois Appellate Court affirmed. Pet. App. 11a-19a. Although the court concluded that, in the absence of a reasonable articulable suspicion of criminal activity, Gillette "was not justified in detaining the defendant for the purpose of running a check of the defendant's criminal history," it dismissed the resulting extension of the duration of the traffic stop as "*de minimis*." *Id.* at 15a-17a. Accepting the trial court's conclusion with respect to the reliability of the dog sniff, it held that because the traffic stop had not been improperly extended, a sniff conducted before conclusion of the stop did not have to be supported by any reasonable suspicion of criminal activity. *Id.* at 18a-19a n.2.[1]

c. The Illinois Supreme Court reversed. Pet. App. 1a-10a. Applying principles drawn from *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court concluded that the "overall reasonableness" of police conduct during a traffic stop should be tested by considering "(1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference [with the citizen's freedom of movement] in the first place." Pet. App. 4a (internal quotation marks omitted). Because it

[1] The court also rejected Caballes's two alternative arguments and held that an officer is not required to issue a verbal warning instead of a written warning, and that a dog's alert is sufficiently reliable to give rise to probable cause to search the trunk. Pet. App. 17a-19a.

was undisputed that Gillette's stop of Caballes was properly initiated, the court focused on whether the State had established that "the [officers'] conduct remained within the scope of the stop." *Id.*

Here, after reviewing the information available to Trooper Gillette before the dog sniff, the court concluded that "there were no specific and articulable facts to support the use of a canine sniff" to check for the presence of drugs in Caballes's car. Pet. App. 4a-5a. Rather, "even when [all the available pre-sniff] factors are viewed together, they constitute nothing more than a vague hunch that defendant may have been involved in possible wrongdoing." *Id.* at 5a. In view of that conclusion, the court held that in this case the use of the dog sniff "impermissibly broadened the scope of the traffic stop . . . into a drug investigation" (*id.* at 4a), and "the trial court should have granted defendant's motion to suppress the evidence obtained after the police dog's alert" (*id.* at 5a).

Three Justices dissented. Pet. App. 6a-10a. In their view, this Court's cases established that "a canine sniff is not a search," and "allowing a canine to sniff a vehicle that is already detained does not transform the seizure into a fourth amendment search." *Id.* at 7a. The dissenters rejected the majority's reliance on *Terry* in applying an "articulable facts" standard, arguing instead that if the dog sniff was any sort of "search" then it could not be conducted without probable cause, while if it was "not a search," it could not implicate the Fourth Amendment at all. *Id.* at 8a-10a. They reasoned that "[t]here simply cannot be a 'reasonable suspicion' middle ground because the United States Supreme Court has not expanded *Terry* to general searches for incriminating evidence, as opposed to searches for weapons." *Id.* at 10a. Accordingly, they would have held that "[t]he canine sniff was not a search, and thus the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it." *Id.*

SUMMARY OF ARGUMENT

Respondent was stopped for speeding, for which the stopping officer decided to issue him a warning. A second officer, apparently in accordance with standard procedure, drove his drug detection dog to the scene and had it sniff the stopped car—even though the sniff could not have disclosed anything relevant to the traffic violation, and the police had no reasonable suspicion of a drug offense. The State argues that the Fourth Amendment did not require any justification for the drug sniff, beyond probable cause to believe that respondent had violated a traffic law.

1. This Court has viewed dog sniffs in particular contexts as imposing only modest burdens on Fourth Amendment interests. Nothing, however, in *United States* v. *Place*, *City of Indianapolis* v. *Edmond*, or any of the Court's other cases establishes the sweeping proposition the State advances here: That use of a trained dog to sniff a locked car trunk requires no individualized justification whatsoever, because it is a "Fourth Amendment non-event" (Pet. 5).

While dog sniffs are not physically invasive, they do intrude on reasonable privacy interests. Bringing a drug dog to the scene of a traffic stop for the specific purpose of sniffing a motorist's locked trunk is not at all analogous to observing some contraband item in "plain view" during the ordinary course of another investigation. Moreover, using a drug dog during an otherwise routine stop can be intimidating, accusatory and humiliating. Without any substantive limit on when a sniff is permissible, officers' decisions about when to use a dog are open to the reality or perception of discriminatory investigation. And while drug sniffs may in theory be designed to detect only the presence of contraband, in practice they are prone to errors—including, for example, the detection of non-contraband currency—that will inevitably result in further unjustified invasions of motorists' privacy.

Because investigatory sniffs by drug dogs during routine traffic stops implicate such Fourth Amendment interests, they should not be authorized in the absence of some

reasonable, articulable, individualized suspicion of wrongdoing that could be either sharpened or dispelled by the sniff. Requiring that modest level of justification will not interfere with any legitimate investigative activity. It will, however, prevent police from using roving, suspicionless drug sniffs at the scene of routine traffic stops to replace the indiscriminate checkpoints, serving only a general interest in crime control, that this Court specifically disapproved in *Edmond*.

2. The fact that the police had probable cause to stop Caballes for speeding did not authorize them to undertake an investigatory dog sniff, designed solely to prospect for possible evidence of an unrelated offense. Standard Fourth Amendment principles, reflected in *Terry* v. *Ohio* and many other decisions, require particularized justification not only for the initiation of a non-consensual police encounter, but for its scope. Those principles apply even when an encounter is justified by probable cause (or, for that matter, even when the police are executing a warrant). They cannot be reconciled with the State's submission that officers who have probable cause to stop a driver for speeding need no further justification to conduct a dog sniff designed to detect illegal drugs. Adopting that standard would be an open invitation to abuse.

The Illinois Supreme Court held only that when officers stop a driver on the highway, they may not take the additional, targeted investigative step of having a dog sniff the car for drugs unless that measure is either reasonably related to the circumstances that justified the initial stop, or otherwise supported by some reasonable suspicion of drug-related wrongdoing. That standard appropriately balances the government's interest in law enforcement against the important personal interests protected by the Fourth Amendment.

ARGUMENT

Respondent Caballes was stopped on the highway based on probable cause to believe that he had committed a minor traffic violation—driving 71 miles per hour in an area where the limit was 65. A second officer, evidently in accordance with standard procedure, monitored the police scanner, heard about the traffic stop, and drove his drug-detection dog to the scene of the stop for the specific purpose of walking the dog around the stopped car, just to see if the dog smelled any drugs.

The State does not challenge the Illinois Supreme Court's conclusion that until the dog alerted at Caballes's trunk, the officer who stopped him for speeding had no reasonable suspicion of any other criminal activity. Because there was nothing to justify the drug sniff, the State is forced to argue that it required no justification. The State contends that it was entitled to use this focused criminal investigative technique, under these everyday circumstances, without *any* threshold level of relevant, individualized suspicion, because having a drug-detection dog sniff a motorist's closed trunk on the side of the highway is "a Fourth Amendment non-event." Pet. 5.

This Court should not accept that glib dismissal of Fourth Amendment interests. The court below held only that an individually targeted, investigatory dog sniff of a car that police have stopped on the highway must either rest on some reasonable suspicion of wrongdoing to which the sniff would be relevant, or otherwise be "reasonably related . . . to the circumstances which justified the interference [with the citizen's freedom of movement] in the first place." *See* Pet. App. 4a-5a (internal quotation marks omitted). Those minimal requirements fairly balance the limited, but real, intrusion entailed by an investigative dog sniff against the citizen's constitutional right to be free of "unreasonable" invasions of the privacy, possessory, and liberty interests that the Fourth Amendment protects. Indeed, what is perhaps most remarkable about this case is the government's insistence that it should instead be free to use targeted criminal

investigatory techniques against particular citizens based on nothing more than its general interest in crime control, without any specific justification whatsoever.

I. AN INDIVIDUALLY TARGETED, INVESTIGATIVE DOG SNIFF IS NOT "A FOURTH AMENDMENT NON-EVENT"

A. This Court Has Never Held That Investigative Dog Sniffs Do Not Implicate Fourth Amendment Interests

In arguing that the Fourth Amendment simply has nothing to say about the dog sniff at issue here, the State and its amici rely principally on this Court's decisions in *United States* v. *Place*, 462 U.S. 696 (1983), and *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000). Neither decision sweeps as broadly as the State contends.

1. In *Place*, federal agents suspected that an airline passenger was carrying drugs in his luggage. 462 U.S. at 698-699. Lacking probable cause to search the luggage or to make an arrest, the officers allowed the passenger to leave the airport, but they detained his bag, took it to a different location, and had a drug dog sniff it. *Id.* at 699. The question presented was whether *Terry* principles, allowing a limited intrusion on Fourth Amendment interests based on less than probable cause, applied to the seizure of the luggage, and the Court held that they did—although on the facts of the case, it held that the length and manner of the seizure "exceeded the permissible limits of a *Terry*-type investigative stop." *Id.* at 702, 709.

In the course of its discussion, the Court pointed out that the question whether reasonable suspicion was enough to justify temporary detention of the luggage would be academic if subjecting the detained luggage to a dog sniff—which was, in *Place*, the *purpose* of the detention—was "itself a search requiring probable cause." 462 U.S. at 706. In that context, the Court noted its understanding that a properly conducted dog sniff was "much less intrusive than a typical search," "disclose[d] only the presence or absence of narcotics, a contraband item," and did not subject the owner

"to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.* at 707. On that basis, the Court concluded that the dog sniff did not require any greater justification than the reasonable suspicion that was advanced to justify the initial detention of the luggage, because "the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.*

The Court in *Place* was careful to confine the scope of its analysis to "the particular course of investigation" and the "precise type of detention" presented by the facts of the case before it. 462 U.S. at 707-708. The type of police encounter involved here is materially different. Most importantly, in *Place* the dog sniff was logically related to—indeed, it was the object of—the detention whose Fourth Amendment legitimacy the Court was principally considering. Here, by contrast, the dog sniff of Caballes's car is functionally unrelated to the Fourth Amendment justification for his initial detention.[2] Certainly, *Place*'s reasoning suggests

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[2] The sniff in *Place* also involved checked luggage detained in an airport, and was conducted by the police in private. While the locked trunk of a personal car may not be as private a place as, say, a locked closet in a home, it is at least arguably more private than luggage that has been checked on a flight and then retrieved from the baggage claim at an airport. *See generally, e.g., Edmond*, 531 U.S. at 47-48 (Fourth Amendment has narrower scope in airports, where need for "measures to ensure public safety can be quite acute"); *United States* v. *Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985) (checked baggage is surrendered to common carrier that also has responsibility for assuring safety of passengers by monitoring what is carried on planes); *State* v. *Tackitt*, 67 P.3d 295, 299-303 (Mont. 2003) (insignificant privacy interest in checked luggage). Moreover, the sniff in this case was conducted in the presence of the individual being investigated, and in an area readily viewed by other members of the public. The use of drug dogs in this manner is more intimidating, accusatory, and embarrassing than was the case in *Place*. Cases before and after *Place* have held, for example, that a dog sniff of a suspect's person is a "search." *E.g., B.C.* v. *Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999); *Horton* v. *Goose Creek Indep. Sch. Dist.*, 690

that in many circumstances the Court will view a properly conducted dog sniff as intruding only modestly on Fourth Amendment interests. Equally certainly, however, *Place* did not resolve whether, at least in some circumstances, even a modestly intrusive dog sniff must be justified by, for example, the correspondingly minimal degree of reasonable suspicion *of a drug offense* that was present in *Place*—or whether instead, as the State contends, a dog sniff requires no justification at all. *See, e.g., Thomas*, 757 F.2d at 1366-1367 (dog sniff at apartment door is a search; "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search.").[3]

2. In *Edmond*, the Court held that the Fourth Amendment does not permit the government to set up a highway "checkpoint" at which motorists are subjected to "brief, suspicionless seizures," where the "primary purpose" of the program is "to detect evidence of ordinary criminal wrongdoing"—or, more specifically, "the discovery and interdiction of illegal narcotics." 531 U.S. at 34, 37-38. As in *Place*, before turning to its central inquiry, the Court paused to note

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F.2d 470, 477-479 (5th Cir.1982) (per curiam); *Doe* v. *Renfrow*, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from denial of cert.) (distinguishing sniff of person from sniff of "inanimate and unattended objects"); *Commonwealth* v. *Martin*, 626 A.2d 556, 559-561 (Pa. 1993) (sniff of person requires probable cause under state constitution).

[3] *See also United States* v. *Quinn*, 815 F.2d 153, 159 (1st Cir. 1987) ("To be entitled to use a dog for purposes of making a sniff test, the officers were required merely to have had 'reasonable suspicion' that the car contained narcotics, at the moment it was performed.") (citing *Place*, 462 U.S. at 698); *Tackitt*, 67 P.3d at 301 (*Place* sanctioned certain warrantless dog sniffs where reasonable suspicion of drug activity existed); *State* v. *Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002) ("[*Place*] concluded that a reasonable, articulable suspicion of criminal activity was required to seize the luggage in order to conduct the dog sniff."); *State* v. *Ortiz*, 600 N.W.2d 805, 820 (Neb. 1999) (dog sniff of apartment hallway was a search); *People* v. *Dunn*, 564 N.E.2d 1054, 1057-1058 (N.Y. 1991) (under state constitution, although dog sniff of luggage at an airport is not a search, sniff of apartment hallway is); *People* v. *Unruh*, 713 P.2d 370, 377-378 (Colo. 1986) (dog sniff of safe was a search).

that its analysis was not controlled by the fact that one of the things the police did at the checkpoints was to walk drug-detection dogs around the stopped cars. *Id.* at 40.

As in *Place*, if those sniffs amounted to "searches" as that term is commonly used, they would normally have required probable cause, and the whole complexion of the case would have been different. Reiterating *Place*'s observation that a dog sniff of a car's exterior is "much less intrusive than a *typical* search" (531 U.S. at 40 (emphasis added)), the Court focused instead on the "primary purpose" of the challenged program—implying that *if* the Fourth Amendment generally permitted brief, suspicionless roadside stops for the specific purpose of allowing the police to check for narcotics-related activity, then the use of a drug sniff as one part of such a stop would not change the constitutional result. In the end, however, the Court concluded that "[w]hen law enforcement authorities pursue primarily general crime control purposes at [highway] checkpoints . . . , stops can only be justified by some quantum of individualized suspicion." *Id.* at 47. In light of that holding, the Court had no occasion to decide what sort of Fourth Amendment justification might be necessary for a drug sniff under any other circumstances—in particular, where the justification advanced for a stop bears *no relation at all* to the investigative purposes of the sniff. *Cf. id.* at 47 n.2 (expressing "no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car," and citing *Terry* v. *Ohio*'s standard that any "search must be 'reasonably related in scope to the circumstances which justified the interference in the first place.' " (some internal quotation marks omitted)).

3. Other cases in which this Court has discussed *Place* likewise do not resolve the question presented here. In *Soldal* v. *Cook County*, 506 U.S. 56, 62-64 (1992), the Court reaffirmed that the Fourth Amendment protects property as well as privacy interests, and thus was violated when government agents physically detached and moved an

individual's entire mobile home—even though they did not look inside. *Soldal* relied in part on the two-stage analysis—looking to both privacy and property interests—used in *Place* and in *United States* v. *Jacobsen*, 466 U.S. 109 (1984). *Jacobsen* held that the government did not violate the Fourth Amendment by conducting a field test to confirm that a highly suspicious white powder, already revealed to view when a private courier service opened a package that had been committed to it for delivery, was in fact cocaine.

The facts and holdings of *Soldal* and *Jacobsen* are remote from the facts and question here. *Jacobsen* does focus on one part of the reasoning in *Place*—that the dog sniff, at least as the Court understood the matter, "could reveal nothing about noncontraband items." 466 U.S. at 123-124 & n.24. And both cases contain broad language, going well beyond what *Place* actually held. *See Soldal*, 506 U.S. at 63 (describing *Place* as holding that a sniff was not a search "because it did not compromise any privacy interest"). What the Court said just last Term about *Edmond*, however, applies equally here with respect to those cases in which the Court has previously mentioned dog sniffs: "We must read . . . general language in *Edmond* as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004).[4]

The Court's cases surely indicate that the Court has considered dog sniffs to impose only modest burdens on Fourth Amendment interests—indeed, burdens not unlike those imposed by short investigative detentions, or by an

[4] "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

accompanying "frisk" intended to reveal only the presence of accessible weapons that might pose a threat to an officer's safety. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 19 (1968) (recognizing that the terms " '[s]earch' and 'seizure' are not talismans," and rejecting the "notion[] that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.' "). But neither the Court's careful contextual analysis in *Place*, nor its rejection of suspicionless checkpoints in *Edmond*, nor its general references in other cases, may fairly be read as having removed dog sniffs from the ambit of the Fourth Amendment altogether. *Cf. id.* at 17 n.15 ("In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.").

B. The Dog Sniff In This Case Implicated Fourth Amendment Interests

The State and its amici argue that an investigative dog sniff of a motorist's trunk, undertaken during—but without any other connection to—a traffic stop, requires no Fourth Amendment justification because: (1) it does not physically intrude into the interior of the trunk (U.S. Br. 10, 11; Chiefs Br. 5-6); (2) it is analogous to observing objects in plain view from a lawful vantage point (State Br. 8-10; Chiefs Br. 6); (3) it does not cause embarrassment or inconvenience (U.S. Br. 10, 11); and (4) it reveals only limited information about the presence of contraband drugs (State Br. 10; U.S. Br. 10, 11). Under the circumstances here, none of these arguments justifies allowing the police to conduct dog sniffs without any individualized suspicion of wrongdoing that might be revealed by the sniff.

1. The lack of physical intrusion into a motorist's trunk makes a dog sniff less intrusive than an ordinary search, but it does not mean that the sniff invades no privacy interest. At least since *Katz* v. *United States*, 389 U.S. 347, 353 (1967), which held that eavesdropping on a conversation in a phone

booth was a "search," it has been "clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Most recently, in *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that use of a thermal-imaging device from a public street to detect relative amounts of heat emanating from a home constituted a "search," *id.* at 29, although neither government agents nor even probing rays from the machine ever passed through the walls of the home. Use of the imager burdened protected privacy interests because it revealed information about the interior of a private area that would not otherwise have been obtained, in the ordinary course of social interaction, without a physical intrusion. *Id.* at 34. Under *Katz* and *Kyllo*, a non-invasive dog sniff, purposefully used to investigate the contents of a car trunk that is otherwise lawfully closed to the police, clearly at least *implicates* a privacy interest. It merits some level of Fourth Amendment scrutiny. *See Wiegand*, 645 N.W.2d at 130 (*Kyllo* suggests dog sniff could be a search); *People* v. *Haley*, 41 P.3d 666, 671 n.2 (Colo. 2001) (suggesting that *Kyllo* undercuts *Place*'s reasoning).

Kyllo involved a home and not a car, but that does not make its reasoning irrelevant here. *See* U.S. Br. 11 n.1. To be sure, it was least difficult for the Court to confront the question of "technological enhancement" in the context of intrusions involving the home—the context that, more than any other, defines " 'the very core' of the Fourth Amendment." 533 U.S. at 31, 33-34. Moreover, in that context, once the Court concluded that a protected privacy interest had been invaded, the investigative technique at issue was clearly subject to the highest level of Fourth Amendment protection—it was "presumptively unreasonable without a warrant." *Id.* at 40. This case, by contrast, involves a car—a context that the Court recognized as more "difficult." *Id.* at 34. Nonetheless, the only holding called for here is that a dog sniff of a locked trunk, intentionally used as a criminal investigative technique, requires the minimal Fourth Amendment justification of reasonable, individualized suspicion of some offense to which the results of the sniff might be

relevant. *Kyllo*'s core rationale—that even "non-intrusive" investigative techniques raise Fourth Amendment *concerns* when they reveal information about the contents of an otherwise private area—directly supports that conclusion. *See also id.* at 48-49 (Stevens, J., dissenting) ("Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home.").[5]

2. Purposefully transporting a drug-detection dog to the scene of a traffic stop so that the dog can be deployed to sniff the stopped car is not at all analogous to an officer's mere observation of items that are in "plain view" from some vantage point at which an officer's duties have otherwise placed him. To be sure, officers who properly find themselves in one place or another need not "shield their eyes." *Kyllo*, 533 U.S. at 32 (quoting *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986)). Indeed, they are free to keep an eye out for anything that seems suspicious or dangerous, whether or not it is something that they were originally seeking. *Horton* v. *California*, 496 U.S. 128 (1990) (no "inadvertence" requirement for application of plain-view doctrine). But the plain-view doctrine assumes that there is no incremental invasion of privacy, and it does not authorize any expansion of the scope of the otherwise authorized activity that has put an officer in a particular position in the first place. *See, e.g., id.* at 141 ("by hypothesis the seizure of an object in plain view does not involve an intrusion on privacy"); *id.* at 136-137 (in

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[5] *Kyllo* also involved manmade detection technology, rather than a trained dog. There is no reasoned basis for treating animal-assisted enhancement of the human senses differently from mechanical or electronic sense-enhancement for purposes of Fourth Amendment analysis—except perhaps that animal assistance is likely to be, if anything, less accurate, more difficult to interpret, and potentially more alarming or intimidating. Those distinctions—implying, for example, a higher error rate and a correspondingly greater rate of unsuccessful, but clearly intrusive, physical searches following up on positive "sniffs"—would argue for greater, not lesser, Fourth Amendment scrutiny of animal-based sense-enhancement techniques.

addition to object being in plain view, its incriminating character must be "immediately apparent," and the officer "must also have a lawful right of access to the object itself"); *Minnesota* v. *Dickerson*, 508 U.S. 366, 378-379 (1993) (although there is a "plain feel" analogy to the plain-view doctrine, once officer who was frisking a suspect determined that an item was not a weapon, he could not continue to feel it to try to ascertain if it was contraband).

In this case, it might be one thing if the officer who stopped Caballes happened to have a drug dog along, and the dog alerted when the officer pulled alongside Caballes's car.[6] There is, however, nothing in the "plain view" doctrine that justifies immunizing from any Fourth Amendment scrutiny the actions of an officer who, hearing about a traffic stop made by a different officer, drives his dog to the scene for the specific purpose of sniffing the stopped car to check for drugs. *Cf. Arizona* v. *Hicks*, 480 U.S. 321 (1987) (plain-view doctrine did not authorize particular search or seizure where police presence was justified by unrelated exigent circumstances, but police developed probable cause to believe particular stereo items were stolen only after moving the equipment so that they could read its serial numbers).

3. Bringing a drug dog to the scene of a traffic stop to sniff the motorist's car also implicates Fourth Amendment interests because it is, or can easily be perceived as, intimidating, accusatory and humiliating. Such an investigatory sniff, unlike the sniff at issue in *Place*, occurs in the presence of the stopped citizen. Drug dogs are often large, and can easily be intimidating—especially when handled by police. At a minimum, bringing a dog onto the scene of an otherwise routine traffic stop amounts to an "unsettling show of authority." *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979).

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[6] Even in that situation, of course, the contents of Caballes's trunk would hardly have been in "plain view," or even within "plain smell." It is undisputed that officers, unaided by a dog or some enhancement technology, would have had no way of knowing what was in the trunk once Caballes refused to consent to a search.

Bringing a dog to an individual traffic stop also differs markedly from using a dog in an airport or train station, at a public event or building, or at some sort of checkpoint where all or many motorists are being stopped. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Michigan Dep't of St. Police* v. *Sitz*, 496 U.S. 444, 453 (1990) (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976)). In contrast, bringing a dog to the scene of a traffic stop singles out the stopped individual, and suggests suspicion of drug activity, even if the police actually have no reasonable suspicion to support their action. This accusatory element of the encounter—which will typically play itself out in public, at the side of public road, in front of other motorists and passers-by—makes it much more embarrassing, alarming, and annoying.

Moreover, unlike checkpoints at which all passing motorists are stopped, allowing officers unfettered discretion in selecting motorists for individual, but suspicionless, drug sniffs carries with it a real risk that officers will make choices that reflect (or are perceived to reflect) denigrating stereotypes. For example, when the Orlando Sentinel studied the operations of the Criminal Patrol Unit of the Orange County Sheriff's Office—"a special patrol squad that uses routine traffic stops to search for narcotics"—the "records of more than 3,800 stops by the Unit" found that "black drivers represented 16.3% of the drivers stopped," but accounted for "more than 70% of the canine searches." Tracey Maclin, *Race and the Fourth Amendment*, 5I Vand. L. Rev. 333, 352 (1998).

4. It is true that drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband. *See Place*, 462 U.S. at 707; *see also Jacobsen*, 466 U.S. at 123. While that characteristic helps justify treating sniffs as less intrusive than many other investigative techniques, it does not warrant excluding them entirely from Fourth Amendment analysis.

To begin with, as *Kyllo* teaches, Fourth Amendment analysis must take account of the nature of the private space investigated, not just the nature of the information that police obtain. In that regard, as noted above, a home may lie at one end of the spectrum, checked luggage (or the already-revealed contents of a mailed package) near the other, and a locked car trunk somewhere in between. It is difficult to believe that, after *Kyllo*, the Court would approve the use of drug dogs, or technological devices, to snuffle around the outside of a home, even if the sniffs were intended only to disclose drug fumes, or other subtle evidence of the presence of contraband, escaping from the inside of the house. *Cf. Kyllo*, 533 U.S. at 37 ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."). If that is so, however, then using the same technique on the also presumptively—although less—private area of a car trunk must also require at least some degree of justification.

Even assuming, however, that there is no cognizable privacy interest in contraband, a program of conducting dog sniffs will inevitably intrude on, or lead to intrusion on, legitimate privacy interests, unless the sniffs are so reliable that they never lead to physical searches of private spaces that turn out not to contain any drugs. *Place*'s discussion of dog sniffs—which was not, of course, focused on the present question of whether sniffs such as those at issue here implicate *any* privacy interest, warranting *any* degree of Fourth Amendment scrutiny—essentially assumed the accuracy of sniffs, at least if performed "by a well-trained . . . dog." 462 U.S. at 707. That assumption may have been adequate to support the Court's limited holding, but it was made without the benefit of evidence, fact-finding, briefing or argument. *See id.* at 719 (Brennan, J., concurring); *id.* at 723-724 (Blackmun, J., concurring). In the present context, the Court should take care to note that dog sniffs clearly do produce "false positives."

As experience since *Place* has amply shown, both drug dogs and their handlers make mistakes. *See, e.g., Merrett* v. *Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (of 1450 vehicles sniffed at checkpoint, "[t]he dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics"); *Doe* v. *Renfrow*, 631 F.2d 91, 95 (7th Cir. 1979) (Fairchild, C.J., dissenting from order denying reh'g) (of 2780 students randomly sniffed, dogs alerted to 50 students, but only 15 were found to possess contraband). Drug dogs sometimes alert merely to the smell of another dog. *Doe* v. *Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind.), *aff'd in part*, 631 F.2d 91 (7th Cir. 1979).

They also frequently alert simply to currency that contains traces of narcotics, indicating only that the bills were at some point in proximity to the drugs. *See United States* v. *$506,231 in U.S. Currency*, 125 F.3d 442, 453 (7th Cir. 1997) ("Even the government admits that no one can place much stock in the results of dog sniffs because at least one-third of the currency in the United States is contaminated with cocaine."); *United States* v. *$639,558 in U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992) (citing officer's testimony "that 10 percent of the alerts he had witnessed were to cash alone, a phenomenon we have encountered before"). Currency is *not* contraband. The use of a technique that is prone to trigger otherwise impermissible searches based solely on the presence of currency plainly invades legitimate privacy interests, and cannot be justified as some sort of surgically precise measure that by its nature can detect only illegal substances.[7]

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[7] Estimates indicate that a substantial proportion of U.S. currency—perhaps 70-90%—is contaminated with drug residue. *See United States* v. *$53,082.00 in U.S. Currency*, 985 F.2d 245, 250 n.5 (6th Cir. 1993) (" '[T]here is some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation.' ") (quoting *United States* v. *$80,760 in U.S. Currency*, 781 F. Supp. 462, 475 & n.32 (N.D. Tex. 1991)); *United States* v. *$5,000 in U.S. Currency*, 40 F.3d 846, 849-850 (6th Cir. 1994); *$639,558.00 in U.S. Currency*, 955 F.2d at 714 n.2 (referencing expert testimony that 90% of all cash in the United States contains sufficient quantities of cocaine to cause a trained dog to alert); *Courts Reject Drug-Tainted Evidence*, 79 A.B.A.J. 22 (Aug. 1993).

Handler error can also lead to false positives—and thus to unjustified physical searches. A handler may, for example, fail to distinguish a true alert from the dog's merely showing "interest" in an object. *See United States* v. *Guzman*, 75 F.3d 1090, 1096 (6th Cir. 1996). There are many other possible mistakes. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 422-425 (1997).

Finally, and of particular importance here, the risk of false positives is heightened when sniffs are undertaken in the absence of any independent reasonable suspicion of drug possession—suspicion of the sort that was present, for example, in *Place*, but is absent here. "[D]og sniffs are least effective when they survey a random population"; and under such circumstances, "even a highly accurate dog will inevitably trigger numerous false alerts." Bird, 85 Ky. L.J. at 430. False alerts, in turn, will trigger plainly intrusive physical searches—here, of the cars of motorists who have been stopped by the police for ordinary traffic violations.

We need not contend that these risks of error, and of unwarranted physical intrusion into private areas that will turn out not to contain contraband at all, require treating every dog sniff as a " 'full-blown search' " (*Terry*, 392 U.S. at 19) that may not be undertaken without probable cause. We do contend, and the Court should hold, that a purely investigatory drug sniff of the particular sort at issue here is not "a Fourth Amendment non-event" (Pet. 5). Such a sniff implicates Fourth Amendment interests to a sufficient extent that it should not be authorized in the absence of some reasonable, articulable, individualized suspicion of wrongdoing that could be sharpened or dispelled by the sniff.

C. The Sniff Of Caballes's Trunk Was Unreasonable In The Absence Of A Reasonable, Articulable Suspicion Of Drug-Related Wrongdoing

It is no novelty for the Court to recognize a category of police conduct that burdens Fourth Amendment interests to an extent that requires some justification, but not so substantially as to require probable cause or the obtaining of a warrant. As *Terry* itself demonstrates, in some circumstances balancing "the nature and extent of the governmental interest involved" against "the nature and quality of the intrusion on individual rights" leads to an intermediate conclusion. 392 U.S. at 22, 24; *see also, e.g.*, *Edmond*, 531 U.S. at 42-43 ("[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

"In appropriate circumstances the Fourth Amendment allows a properly limited 'search' . . . on facts that do not constitute probable cause to . . . search for contraband or evidence of a crime." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (discussing, *inter alia*, *Terry*); *see Florida* v. *Royer*, 460 U.S. 491, 505 n.10 (1983) (plurality opinion) (recognizing, before *Place*, that a dog sniff might be justified using the "articulable suspicion" standard). The test the Court has typically applied in such situations requires that officers "be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21; *see Richards* v. *Wisconsin*, 520 U.S. 385, 394-395 (1997) (requiring reasonable articulable suspicion to justify no-knock entry). That is the standard applied here by the Illinois Supreme Court, and it is well adapted for the purpose.

As discussed above, the sniff of Caballes's trunk was perhaps a limited intrusion, but it did intrude to a cognizable extent on Caballes's legitimate privacy and liberty interests. On the other side of the balance, a sniff such as this one is not justified by any interest in, for example, the physical safety of the officer who made the traffic stop, or in public safety beyond the general interest in crime control. But the Court has expressly recognized that the general crime-control interest—even in the specific context of combatting drug trafficking on the Nation's highways—is no "justification for a regime of suspicionless" intrusions. *Edmond*, 531

U.S. at 41-43; *see id.* at 43 ("We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."). *Id.* at 43. In such a situation, it is most reasonable to apply the intermediate standard of reasonable suspicion.[8]

That standard sets only a low bar for police, and will not interfere with any legitimate investigative activity. It could, of course, interfere with the sort of indiscriminate "dragnet" operation that this Court disapproved in *Edmond*—and that law enforcement authorities have evidently now sought to recreate in the guise of purportedly random, suspicionless investigation of motorists who have been stopped for non-drug-related traffic offenses. *See generally, e.g.*, Chiefs Br. 7 (describing "drug interdiction programs" used by "many police agencies" that "actively utilize traffic stops to *develop* reasonable suspicion of illegal drug activity" (emphasis added)). But nothing in the Constitution or this Court's cases requires the Court to countenance the use of roving drug patrols that amount to little more than an obvious end-run around *Edmond*'s prohibition on fixed drug-interdiction "checkpoints." *Cf. Whren* v. *United States*, 517 U.S. 806, 818 (1996) (noting argument that "the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop."). While the police may not need much in the way of individualized suspicion in order to

[8] The degree of justification that the Fourth Amendment requires for particular police conduct frequently varies with the surrounding circumstances. The balance struck for this category of police activity—suspicionless drug sniffs of the cars of motorists who have been stopped for traffic offenses—might be different from the balance struck in other circumstances. For example, with respect to suspicionless sniffs to detect the presence of explosives in or near public buildings or assemblies (*cf.* Chiefs Br. 12-14), the general expectation of privacy would likely be lower, and in any event the degree of intrusion involved in a sniff might well be outweighed by the very different public interests involved.

justify an investigative drug sniff of a motorist's trunk, in this case they had no reasonable suspicion at all. Pet. App. 5a. An investigative dog sniff conducted without *any* individualized justification does not comport with the Fourth Amendment.

II. THE SNIFF OF CABALLES'S TRUNK EXCEEDED THE PERMISSIBLE SCOPE OF A STOP THAT WAS JUSTIFIED ONLY BY PROBABLE CAUSE RELATING TO A TRAFFIC VIOLATION

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning" of the Fourth Amendment. *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996). In this case, it is undisputed that Trooper Gillette had probable cause to believe Caballes had been driving six miles per hour over the legal speed limit, and that he was accordingly entitled to stop Caballes, obtain his license and registration, and otherwise take appropriate action to investigate and address the traffic offense. Indeed, Gillette might have been authorized to place Caballes under full custodial arrest *for the traffic offense*, had he chosen to do so—which of course he did not.

Probable cause to detain Caballes for speeding did not, however, authorize Gillette's colleague, Trooper Graham, to bring his drug-detection dog to the scene of the stop and walk it around Caballes's car, for the sole and specific purpose of satisfying general investigative curiosity about whether Caballes might be carrying illegal drugs. That investigative measure bore no relation to the only probable offense that the government has ever invoked to justify the stop. It went well beyond the "limited purpose" (*Whren*, 517 U.S. at 809) of the seizure authorized by the Fourth Amendment.

A. The Fourth Amendment Limits The Scope, As Well As The Initiation, Of A Traffic Stop

As noted above, in *Terry* v. *Ohio* this Court articulated a general principle to guide Fourth Amendment analysis: courts are "to recognize that the Fourth Amendment

governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." 392 U.S. at 17 n.15. *Terry* applied that analysis to the common stop-and-frisk category of police encounters, and it made clear that the appropriate inquiry is a dual one: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference [with a citizen's liberty or privacy] in the first place." *Id.* at 20.

The State and its amici argue that *Terry*'s focus on "the scope, as well as the initiation, of police action" (392 U.S. at 17) is out of place here, because in this case, unlike in *Terry*, the police's initial action in stopping Caballes was supported by probable cause to believe that he had violated a specific provision of the traffic laws. *See, e.g.*, State Br. 12-17. They contend that once police have probable cause to stop a citizen to address one offense, the Fourth Amendment imposes no "special" limit on the scope of the stop, short of outer boundaries such as the use of deadly force. *See, e.g.*, U.S. Br. 12-14; Ark. Br. 14-15. That position cannot be reconciled with *Terry*, with this Court's other cases, or with common sense.

1. *Terry* dealt with a specific "rubric" of police conduct—the investigative stop. 392 U.S. at 20. On consideration, it allowed initiation of limited stops on the basis of reasonable suspicion rather than probable cause, and limited "pat-down" searches designed only to assure officers' safety. The principles it applied, however, are general ones, drawn from, and applicable to, cases that involve other types of government conduct. *See, e.g., id.* at 20-21 (looking to "the notions which underlie both the warrant procedure and the requirement of probable cause" as sources for the approach of balancing governmental interests against the degree of intrusion entailed by particular police conduct). And those principles apply not only to the initiation of police contact, but also to its scope or nature:

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation.

Id. at 28-29. Contrary to the State's argument here, the *Terry* Court clearly was not speaking only of investigative stops when it observed, for example, that "evidence may not be introduced if it was discovered by means of a seizure and search which were not *reasonably related in scope to the justification for their initiation.*" *Id.* at 29 (emphasis added). That principle applies equally to stops based on probable cause—or, for that matter, to searches conducted in execution of a warrant.[9]

To be sure, the reasonable scope of a seizure will be broader when it is based on probable cause, rather than simply on suspicion. To take only the most obvious example, a probable-cause based seizure of the person may constitutionally extend, without any further justification, all the way to full custodial arrest. *See Atwater* v. *City of Lago Vista*, 532 U.S. 318 (2001). This rather elementary observation is, indeed, the whole substance of the Court's passing observation in *Berkemer* v. *McCarty*, 468 U.S. 420, 439 n.2 (1984), that its discussion of the Fifth Amendment issue in that case was not meant to "suggest that a traffic stop

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[9] Naturally, if information lawfully acquired *after* a proper initial stop gives rise to reasonable suspicion (or probable cause) with respect to another offense, the police are entitled to expand the scope of the initial investigation to whatever extent is independently justified by that new information. *See, e.g., United States* v. *Jones*, 269 F.3d 919, 926-927 (8th Cir. 2001) ("[I]f the response of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions."); *Medrano* v. *State*, 914 P.2d 804, 808 (Wyo. 1996) (although reasonable suspicion justifying initial stop concerned a robbery, additional reasonable suspicion developed during the course of the stop justified asking whether defendant was carrying drugs or weapons).

supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." Of course, where there is probable cause to believe, rather than mere suspicion, that an individual has committed a particular offense, the police may go further in detaining the individual to investigate *that offense*. The State and its amici misread *Berkemer*, however, just as they misread *Terry*, when they argue that the existence of probable cause to seize an individual to address one offense gives officers *carte blanche* to expand the scope of that seizure to include any other sort of investigation that they might choose to undertake.[10]

2. As *Terry* suggests, the importance of delimiting the *scope* of the government conduct that is recognized as constitutionally reasonable under particular circumstances is a constant theme in this Court's Fourth Amendment jurisprudence. This is true even in cases in which some police conduct is clearly justified by the existence of probable cause to believe that some particular offense has been committed.

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), for example, the Court considered a case that started just like this one: officers properly stopped a motorist to address an observed traffic violation—in *Mimms*, driving with an expired license plate. *Id.* at 107. The central question was whether the Fourth Amendment allowed the officers to direct the driver to get out of his car during the stop. *Id.* at 109. The Court began by noting that, "unlike [in] *Terry*," there was no question about the propriety of the initial stop. *Id.* It then balanced the important interest in officer safety against the "*de minimis*" incremental intrusion on the driver's interests, and held that the order to alight was

[10] Accordingly, lower courts have properly refused to read *Berkemer* "to imply that the existence of probable cause to believe that only a minor traffic violation was committed is sufficient to sanction a substantially more intrusive stop than would be justified under *Terry*, at least where the police officer is not undertaking to make an arrest based on the traffic violation." *Mitchell* v. *United States*, 746 A.2d 877, 887 (D.C. 2000).

constitutionally permissible. *Id.* at 110-111. Also tellingly, the Court then went on to explain that a second question—whether the officers were authorized to frisk the driver after noticing a bulge in his jacket—was "controlled by *Terry*," and that the situation clearly warranted a limited *Terry* pat-down. *Id.* at 111-112.

Although the Court's opinion in *Mimms* is, as the United States remarks, "brief" (U.S. Br. 16), its analytical implications are unmistakable. Indeed, the opinion could have been shorter still if the Court had taken the view urged by the State and its amici here—that once the police have probable cause to stop a motorist for any infraction, there is no need for any "special inquiry" into anything else they may do during the stop, short of some "exceptional" extra intrusion such as the use of deadly force. U.S. Br. 13; *see* State Br. 14-15; Ark. Br. 11-12. Instead, the Court viewed even a minor incremental expansion of the scope of the initial stop as requiring its own Fourth Amendment justification. *See also Maryland* v. *Wilson*, 519 U.S. 408, 411-414 (1997) (reaffirming *Mimms*'s approach of balancing interests, and treating existence or absence of probable cause with respect to a particular individual as only one factor in the analysis).

Michigan v. *Long*, 463 U.S. 1032 (1983), would also have been a much easier case if the Court subscribed to the State's theory that probable cause to stop a car for one offense eliminates the need for much additional Fourth Amendment inquiry about the scope of the stop. There, officers who stopped a car for "traveling erratically and at excessive speed" later conducted a protective search of the car's interior. *Id.* at 1035-1036. Applying the same underlying balancing principles as in *Terry*, the Court held that the limited protective search was reasonable. *Id.* at 1045-1052. Significantly, the Court first explained that although the officers had probable cause to arrest the driver for speeding or for driving while intoxicated, they did not act on that basis, and the State had not presented the question whether "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may never-

theless conduct a search as broad as those authorized" in connection with a full custodial arrest. *Id.* at 1035 n.1.

That question was presented in *Knowles* v. *Iowa*, 525 U.S. 113 (1998), and the Court unanimously answered "no." Knowles, like Caballes, was stopped for speeding. *Id.* at 114. As in this case, the stopping officer "issued [Knowles] a citation rather than arresting him." *Id.* Nonetheless, he also searched the car, finding marijuana. *Id.* The Court held that in the absence of an actual custodial arrest, that search went beyond the permissible scope of the speeding stop—even though the probable cause justifying the stop would also have justified a full arrest. Balancing, as usual, the incremental intrusion on the driver's interests against the government's asserted need for that intrusion, the Court reasoned that where no arrest was made, a search of the car could not be justified either by a need to disarm the driver or by a need to discover or preserve evidence. *Id.* at 116-118.

As to the need to disarm, the Court noted that a traffic stop "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." 525 U.S. at 117 (quoting *Berkemer*, 468 U.S. at 439 (internal quotation marks omitted)). Concern for officer safety during such a stop, the Court explained, can justify some intrusions, but not others. As to the need to discover and preserve evidence, the Court rejected the government's proffered justifications with an observation that is directly relevant here:

> Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute *that offense* had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Id. at 118 (emphasis added).

Similarly, the Court rejected the government's argument that a search was justified because a driver stopped for speeding might attempt to "destroy evidence of another, as yet undetected crime." 525 U.S. at 118. Accordingly, *Knowles* squarely rejects a central proposition of the State's argument here: that once the police have probable cause to stop a driver for speeding, the Fourth Amendment allows them to expand the *scope* of their investigation based on nothing more than "the possibility that an officer [will] stumble onto evidence wholly unrelated to the speeding offense." *Id.*

One could multiply examples. *See, e.g., Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (police could not bring reporters into home to witness execution of arrest warrant; even "police actions in execution of a warrant [based on probable cause must] be related to the objectives of the authorized intrusion"). The essential point, however, is that the Court has always paid careful attention not only to what circumstances justify police officers in commencing non-consensual citizen encounters, but also to the metes and bounds that the Fourth Amendment continues to impose on such encounters even if they are legitimately begun. *See, e.g., Edmond*, 531 U.S. at 47 n.2 (reaffirming permissibility of certain suspicionless "checkpoint" stops, but reserving "the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car"); *Hiibel* v. *Sixth Judicial Dist. Court*, 124 S. Ct. 2451 (2004) (permissible scope of investigative stop extends to requiring stopped individual to identify himself); *Muehler* v. *Mena*, No. 03-1423 (cert. granted June 14, 2004) (presenting question whether officers exceeded permissible scope of detention in connection with execution of search warrant by asking detained individual questions about other criminal activity); *cf. Thornton* v. *United States*, 124 S. Ct. 2127, 2137 (2004) (Scalia, J., concurring in the judgment) (proposing reformulation of rationale for permitting warrantless searches of cars incident to the arrest of the driver, and noting that such searches should be "limit[ed] . . . to cases where it is reasonable to believe evidence *relevant to the crime of arrest* might be found in the vehicle" (emphasis added)). The same sort of inquiry is warranted in this case.

3. In arguing against any serious scope inquiry, the State and its amici rely principally on this Court's decisions in *Berkemer* v. *McCarty*, *Atwater* v. *City of Lago Vista*, and *Whren* v. *United States*. None of those cases supports the State's position here.

In *Berkemer*, the Court held that "persons temporarily detained pursuant to [traffic] stops are not 'in custody' for the purposes of *Miranda*." 468 U.S. at 440. That holding rests on the Court's conclusion that in terms of interactions between police and citizen, traffic stops are usually more akin to *Terry* stops than to custodial arrests. *Id.* at 437-439. We have already discussed why the Court's passing observation that it did not mean this comparison to "suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop" (*id.* at 439 n.29), while perfectly sensible, says nothing about whether the permissible scope of a traffic stop under the Fourth Amendment extends to the active investigation of (or, rather, active prospecting for) *unrelated offenses*. In addition, we note that in characterizing traffic stops as generally non-coercive in atmosphere, and therefore more like *Terry* stops than like formal arrests, *Berkemer* specifically relied on the *limited nature* of *Terry* stops, which it noted "must be 'reasonably related in scope to the justification for their initiation.'" 468 U.S. at 439-440 (quoting *Terry*, 392 U.S. at 29). That chain of reasoning would cease to be valid if, as the State advocates here, a routine traffic stop automatically authorized the police to deploy additional, targeted investigative measures, such as the dog sniff at issue here, that most citizens would find intrusive and offensive, and that are unrelated to any traffic violation, but are designed solely to fish for evidence of other crimes.[11]

[11] Not surprisingly, those circuits that have concluded that traffic stops based on probable cause are limited by the dictates of *Terry* have focused on *Berkemer*'s analogy to *Terry*. *See United States* v. *Shabazz*, 993 F.2d 431, 434-435 (5th Cir. 1993); *United States* v. *Walker*, 933 F.2d 812, 813, 815 (10th Cir. 1991); *but see United States* v. *Childs*, 277 F.3d 947, 953-954 (7th Cir. 2002) (en banc) (acknowledging some scope limitations, but distinguishing traffic stops based on probable cause from *Terry* stops); *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (similar). Moreover, it is worth noting that although the circuits that have considered the proper scope of traffic stops based on probable cause disagree on the exact scope of such stops and consequently the specific techniques that are permitted during them, they all agree—contrary to the position advanced by the State and its amici—that traffic stops based on probable cause do have limits that require a specific inquiry into whether the investigative technique employed was reasonable under the circumstances. *See United States* v. *Brigham*, No. 02-40719, 2004 WL 1854552, at *3-5 (5th Cir. Aug. 19, 2004) (noting that traffic stops based on probable cause are treated like *Terry* stops, but concluding that unrelated questions are permitted); *Childs*, 277 F.3d at 952-954 (noting that nature and duration of traffic stop based on probable cause must be reasonable, but holding that asking unrelated questions is permissible); *United States* v. *Holt*, 264 F.3d 1215, 1221-1226, 1228-1230 (10th Cir. 2001) (en banc) (noting that traffic stops based on probable cause are limited in both scope and duration and applying balancing test to determine appropriateness of questioning unrelated to the purpose of the stop); *$404,905.00 in U.S. Currency*, 182 F.3d at 648-649 (noting that traffic stops based on probable cause require balancing of interests, but holding that dog sniff that only momentarily extends stop is permissible).

Atwater held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. Caballes has never argued that Trooper Gillette could not have arrested him for speeding. Gillette did not, however, do so, and *Knowles* squarely holds that the permissible scope of the police's conduct in the stop that actually took place is not determined by what might have been permissible if Gillette had instead decided to make a full custodial arrest.

In *Whren*, the police had probable cause to stop a car on the basis of traffic infractions. 517 U.S. at 808. When they approached the car, they "immediately" saw drugs in plain view. *Id.* at 809. This Court rejected an argument that the courts must try to evaluate, with respect to every traffic stop, whether "the [stopping] officer's conduct deviated

materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given." *Id.* at 814. It also declined an invitation to use "the balancing inherent in any Fourth Amendment inquiry" to hold that a plainclothes officer in an unmarked car could not reasonably investigate minor traffic infractions. *Id.* at 816-817.

Neither of those holdings has much to do with the question presented here, which is what scope of investigation the Fourth Amendment permits officers to undertake once they have made a stop that was concededly justified by, but *only* by, probable cause relating to a traffic infraction. In particular, *Whren*'s observation that the result of a Fourth Amendment balancing analysis is generally "not in doubt where the search or seizure is based upon probable cause" (517 U.S. at 817), while no doubt accurate in context, does not speak to how the balance should be struck where probable cause for one offense justifies the initial seizure, but what the government seeks to justify is the use of an investigative technique that could not possibly reveal evidence of *that* offense. *Cf. Knowles*, 525 U.S. at 118.

4. Finally, as a policy matter, there is little to recommend the State's suggestion that the Court dispense with any substantial limitation on what sort of investigation government agents may undertake once they have probable cause to believe that a motorist has committed one traffic offense. To be sure, that probable cause authorizes some degree of warrantless seizure. But to keep that seizure within constitutional bounds, it should be limited by some "criterion of reason." *Chimel* v. *California*, 395 U.S. 752, 765 (1969) (quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)). The Illinois Supreme Court, drawing on *Terry*, imposed such a reasonable (and fully workable) limit here by demanding that the dog sniff of Caballes's car—an active, targeted, investigative measure designed to see if a crime was being committed—be either reasonably related in scope to the circumstances that originally justified the traffic stop, or supported by some independent reasonable articulable suspicion of wrongdoing that the sniff could either strengthen or dispel.

The State and its amici, by contrast, offer *no* standard to limit the scope of the investigation that may be undertaken during any traffic stop. *See* State Br. 16 ("[F]act-specific balancing is inappropriate when determining the validity of routine traffic stops supported by probable cause *and of police conduct occurring at such stops*." (emphasis added)); *see also* Ark. Br. 13 ("Consistent with any other seizure supported by probable cause, a traffic stop meets the general rule of reasonableness without any additional balancing of the interests."). That approach, which is justified only by "the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime" unrelated to the traffic offense that led to an initial stop, "would do little to prevent . . . intrusions" such as the dog sniff at issue here "from becoming a routine part of American life." *Edmond*, 531 U.S. at 42.

Indeed, it is particularly instructive to note the open enthusiasm with which the amici police chiefs embrace what they perceive as *Whren*'s approval of "pretextual traffic stops," which they say "many police agencies . . . actively utilize . . . to develop reasonable suspicion of illegal drug activity." Chiefs Br. 7. It is certainly questionable whether this Court thought the point of *Whren* was principally to "permit law enforcement to employ pretextual stops for the purpose of investigating drug activity." *Id.* at 12. Nevertheless, it is clear that there is a significant Fourth Amendment distinction between making a valid traffic stop, walking up to the stopped car, and seeing drugs in plain view, as in *Whren*, and making a valid traffic stop and then having a colleague bring a drug dog to sniff the car, as in this case (let alone dawdling over the issuance of a warning ticket in order to give the colleague time to arrive, as one could certainly

also conclude happened here).[12] That distinction makes all the difference between viewing *Whren*, for example, as confining judicial review to whether objective circumstances justified particular police conduct, and viewing it as an open invitation to police abuse, particularly in intentionally evading the limits otherwise recognized by *Edmond* on suspicionless drug investigations. *See Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) ("An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.") (citation to *Whren* omitted); *Maryland* v. *Wilson*, 519 U.S. at 423 (Kennedy, J., dissenting) ("The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police.").

B. The Dog Sniff Here Exceeded The Permissible Scope Of The Traffic Stop

Applying these principles, the dog sniff of Caballes's car exceeded the permissible scope of a stop that was justified only by probable cause to believe that he had exceeded the speed limit.

The State proffers no justification for the sniff that bears any relation to the speeding violation. Nor does it claim that the sniff was justified by the interest in officer

[12] In the courts below, Caballes contended that the events in this case also improperly extended the *duration* of the traffic stop to permit the second officer to arrive and conduct the dog sniff. The Illinois Supreme Court did not specifically address that contention. If this Court concludes that the dog sniff here was not beyond the permissible scope of the stop without regard to duration, it should remand the case for further assessment of the duration issue.

safety, or offer any public-safety rationale beyond the public's general interest in crime control. While there is no doubt a substantial public interest in combatting drug trafficking, and the use of motor vehicles in that trafficking no doubt poses special challenges, neither "the gravity of the threat [from drug trafficking] alone" nor "the difficulty of examining each passing car" is enough "to justify a regime of suspicionless searches and seizures." *Edmond*, 531 U.S. at 42-43. And here—unlike, for instance, in *Whren*—the routine conduct of the legitimate traffic stop did *not* give rise to any new, independent suspicion of drug activity that could in turn justify undertaking a further, drug-related investigation. *See* Pet. App. 5a. Accordingly, there is no cognizable government interest to support the suspicionless drug sniff in this case.

On Caballes's side of the balance, by contrast, there is, to begin with, the presumption that individuals are free to go about their business unless government officials have some specific justification for interfering with that freedom. Caballes, of course, was legitimately subject to detention *for the purpose of addressing his speeding offense.* As discussed above, however, while the incremental intrusion on a detained motorist's privacy and liberty interests caused by an investigative drug sniff may be relatively small, it is real; and here, there was *no* legitimate governmental interest to counterbalance it. As to the drug sniff, Caballes stood in the same relation to the police as any other citizen on the highway. The Fourth Amendment does not permit the police to deploy a drug dog to sniff the trunk of any car during the course of a routine traffic stop, just to see what such an investigation might turn up.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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No. 03-923

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROY I. CABALLES, RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Two settled propositions govern this case. First, allowing a drug-detection dog to sniff a vehicle's exterior is not a "search" within the meaning of the Fourth Amendment. Second, no legitimate Fourth Amendment interest is burdened when police officers, positioned at a lawful vantage point, discover incriminating facts without conducting an additional search or seizure. These propositions lead inexorably to the conclusion that police officers need no individualized suspicion that illegal drugs are present to justify conducting an external canine sniff of a vehicle at a lawful traffic stop.

Respondent acknowledges that canine sniffs are not searches and that they do not require probable cause, but nonetheless defends the Illinois Supreme Court's ruling that reasonable suspicion was necessary to justify the sniff of his car. He first argues that a canine sniff bears a close enough resemblance to a search, and imposes enough of an intrusion on privacy interests, as to require at least some individualized suspicion. Alternatively, he maintains that conducting a sniff at a traffic stop expands the "scope" of the stop in a manner that, under *Terry* principles, must be justified by reasonable suspicion. As shown below, respondent's arguments are incompatible with settled precedent and have no basis in Fourth Amendment doctrine.

I. Because A Canine Sniff Of A Vehicle's Exterior Is Not A Fourth Amendment Search, It May Be Conducted Without Individualized Suspicion.

Police action that is neither a "search" nor a "seizure" requires no individualized suspicion. See *Arizona v. Hicks*, 480 U.S. 321, 328 (1987); *Maryland v. Macon*, 472 U.S. 463, 468-469 (1985). In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court unanimously recognized that no search

occurs when a drug-detection dog sniffs the exterior of a stopped vehicle. See *id.* at 40 ("an officer walk[ing] a narcotics-detection dog around the exterior of each car * * * does not transform the seizure into a search"); *id.* at 52 (Rehnquist, C.J., dissenting) ("a 'sniff test' by a trained narcotics dog is not a 'search' within the meaning of the Fourth Amendment"); see also *United States v. Place*, 462 U.S. 696, 707 (1983); Pet. Br. 6-8; U.S. Br. 9-12. It follows that no reasonable suspicion was necessary to justify the exterior canine sniff of respondent's car.

Respondent offers three counter-arguments. First, he disputes the premise that *Place* and *Edmond* hold that canine sniffs need no Fourth Amendment justification. Resp. Br. 8-13. Second, relying upon *Kyllo v. United States*, 533 U.S. 27 (2001), he contends that a sniff of a vehicle's exterior invades legitimate Fourth Amendment interests and therefore demands at least some individualized suspicion — not probable cause, but the lesser standard of reasonable suspicion. Resp. Br. 13-15. Third, respondent likens canine sniffs to the type of police conduct that, under this Court's precedents, may be justified by reasonable suspicion. Resp. Br. 20-23. All three arguments are meritless.

A. Respondent maintains that *Place* is inapposite because the officers there, unlike the officers in this case, had reasonable suspicion that illegal drugs were present. Resp. Br. 8-10. This fundamentally misconstrues *Place*. Reasonable suspicion was relevant in *Place* only as a predicate to its holding that *Terry v. Ohio*, 392 U.S. 1 (1968), which permits brief investigative seizures based upon reasonable suspicion of wrongdoing, applies with full force to luggage. *Place*, 462 U.S. at 700-706. After stating that holding, the Court proceeded to the separate question of whether a "search" occurred when the seized luggage was sniffed by a drug-detection dog. *Id.* at 706-707. That question was separate from the *Terry* issue because, if a

sniff were a search, then the whole encounter, "no matter how brief[,] could not be justified on less than probable cause" — which would have mooted the question whether the seizure exceeded the permissible limits of a *Terry* stop. *Id.* at 706. Thus, contrary to respondent's suggestion, the presence of reasonable suspicion in *Place* was independent of, and had no bearing on, the Court's holding that a sniff is not a Fourth Amendment search.

Respondent's attempt to distinguish *Edmond* is even less convincing. Noting *Edmond*'s holding that the suspicionless drug checkpoint effected an unlawful seizure, respondent contends that "the Court had no occasion to decide what sort of Fourth Amendment justification might be necessary for a drug sniff under any other circumstances." Resp. Br. 11; see also ACLU Br. 26 n.11 (same). But *Edmond* decided precisely that question; its holding that an exterior canine sniff of a stopped vehicle is not a "search" necessarily means that the sniff itself required no Fourth Amendment justification. 531 U.S. at 40 (citing *Place*, 462 U.S. at 707).

B. Respondent next contends that *Kyllo v. United States*, 533 U.S. 27 (2001), supports his view that a canine sniff requires some individualized suspicion that drugs are present. Resp. Br. 13-15. *Kyllo* considered whether "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." 533 U.S. at 29. To answer that question, the Court applied the *Katz* test, which provides that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.* at 33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Court concluded that a "search" occurs whenever "sense-enhancing technology" "not in general public use," such as a thermal-imaging device,

is employed to obtain "any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area." *Id.* at 34 (internal quotations omitted).

Attempting to analogize this case to *Kyllo*, respondent notes that a drug-detection dog, like a thermal-imaging device, reveals information about an enclosed space that could not otherwise be obtained without some physical intrusion. From this premise, respondent maintains that a canine sniff, while not rising to the level of a search, may not be conducted without some Fourth Amendment justification. Resp. Br. 13-15. Respondent's amici takes *Kyllo* a step further, arguing that a canine sniff is actually a "search," albeit one that requires only reasonable suspicion, not probable cause. ACLU Br. 25-30.

Kyllo is inapposite for two reasons. The first relates to the difference between what a canine sniff reveals and what thermal-imaging reveals. A sniff "discloses *only* the presence or absence of narcotics, a contraband item." *Place*, 462 U.S. at 707 (emphasis added); accord, *Edmond*, 531 U.S. at 40; *United States v. Jacobsen*, 466 U.S. 109, 124 & n.24 (1984). Thermal-imaging devices, by contrast, can reveal entirely innocent activities that have nothing to do with contraband, such as the movement of individuals, see *Kyllo*, 533 U.S. at 36 n.3, or "what hour each night the lady of the house takes her daily sauna and bath," *id.* at 38. See also Tr. of Oral Argument, *Kyllo v. United States*, No. 99-8508, at 6-9 (addressing capabilities of thermal imaging); Aronov, *Privacy in a Public Setting: The Constitutionality of Street Surveillance*, 22 QLR 769, 789 (2004) ("evidence suggests that [thermal-imaging technology] can be used to detect many activities which contribute to elevated heat levels, but are legal – such as cooking, bathing, sex, or the use of heat-generating home appliances"); *United States v. Cusamano*, 83 F.3d 1247, 1257-1262 (10th Cir. 1996) (en banc) (McKay, J., dissenting).

This distinction matters under the Fourth Amendment. There is no reasonable expectation of privacy in the mere presence or absence of narcotics. See *Jacobsen*, 466 U.S. at 124 n.24 (no search where "the government conduct could reveal nothing about noncontraband items"); *Place*, 462 U.S. at 707. Thus, under the *Katz* test, a canine sniff is not a search because it reveals nothing in which a reasonable expectation of privacy might lie. The opposite holds for thermal-imaging technology; because such technology can reveal legitimately private information that otherwise would be shielded from public view, its use by law enforcement can be a search. See *Kyllo*, 533 U.S. at 38-39.

The second reason why *Kyllo* is inapposite concerns the fundamental distinction under the Fourth Amendment between homes and cars. Crucial to *Kyllo* was the fact that the thermal-imaging device was directed at a private home. As the Court explained, because "*all* details [in the home] are intimate details," 533 U.S. at 37 (emphasis in original), a reasonable expectation of privacy lies in all aspects of the home that would otherwise remain concealed, *id.* at 34-38. Under *Katz*, it necessarily follows that a search occurs when officers use a thermal-imaging device to reveal otherwise concealed details about a private home. *Id.* at 34, 40. In so holding, however, the Court emphasized that the "firm" and "bright" line it drew "at the entrance to the house," *id.* at 40, would not apply to other places, "such as * * * automobiles," *id.* at 34. Accord, *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 889 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."); *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) ("This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."). In cars and other places outside the home, not all details are intimate details, and thus all do not fall within the reasonable expectation of privacy. This is particularly true of details regarding the presence or absence of narcotics.

For these reasons, *Kyllo* is fully consistent with the proposition — reaffirmed just seven months before *Kyllo* in *Edmond* — that no Fourth Amendment justification is required when a drug-detection dog sniffs the exterior of a stopped vehicle. See *Morgan v. State*, 95 P.3d 802, 807-808 (Wyo. 2004) (reconciling *Kyllo* with *Place* and *Edmond*); *State v. Bergmann*, 633 N.W.2d 328, 334-335 (Iowa 2001) (same); 1 Wayne R. LaFave, *Search and Seizure*, § 2.2(f), at 455 (3d ed., 2004 pocket part) (same); Pierce, et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J. L. MED. & ETHICS 567, 573 (2003) (reconciling *Kyllo* with *Place*).

C. Finally, respondent contends that canine sniffs fall within "a category of police conduct that burdens Fourth Amendment interests to an extent that requires some justification, but not so substantially as to require probable cause or the obtaining of a warrant." Resp. Br. 20-21. Respondent's argument founders at the outset because its premise, that a canine sniff "burdens Fourth Amendment interests," is incorrect. As shown above (*supra*, at 4-5), a canine sniff of a vehicle's exterior does not burden any interest recognized as legitimate under the Fourth Amendment. For that reason, a sniff does not require any justification.

The three precedents cited by respondent — *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); and *Richards v. Wisconsin*, 520 U.S. 385 (1997) — do not help his cause. In each case, the Court subjected certain police conduct to the reasonable suspicion standard. But the conduct in those cases, unlike the canine sniff here, truly burdened Fourth Amendment interests. The investigative seizure and pat-down search of a person in *Terry*, and the investigative seizure of a vehicle and its occupants in *Brignoni-Ponce*, were actual searches or seizures. The "no-knock entry" in *Richards* implicated the interest — recognized at common

law and incorporated at the Founding into the Fourth Amendment, 520 U.S. at 388 — in being "provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Id.* at 393 n.5 (citing *Wilson v. Arkansas*, 514 U.S. 927, 930-932 (1995)).

Terry, *Brignoni-Ponce* and *Richards* illustrate the principle that there are limited circumstances where police conduct *that actually burdens Fourth Amendment interests* may be justified under the lesser standard of reasonable suspicion, rather than under the ordinary and more stringent standard of probable cause. See also *United States v. Knights*, 534 U.S. 112, 121 (2001) (same for search of a probationer's home); *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (same for protective sweep of a house during an arrest). Those cases do not hold or even suggest that reasonable suspicion would ever be necessary to justify police conduct that burdens no Fourth Amendment interests.

In the end, respondent concedes that he is asking the Court to recognize an intermediate category of police conduct — not quite a Fourth Amendment search, but somehow more than a non-search — to which "the intermediate standard of reasonable suspicion" would apply. Resp. Br. 22. Justice Blackmun advanced a nearly identical approach in *Place*, suggesting that "a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion." 462 U.S. at 723 (opinion concurring in the judgment). The Court in *Place* did not accept Justice Blackmun's suggestion, and four years later it rejected a similar proposal in *Arizona v. Hicks*, *supra*.

The police officer in *Hicks* entered an apartment after a gunshot had been fired; saw some expensive stereo equipment, which he (correctly) suspected was stolen; and slightly nudged a turntable to reveal its serial number. 480 U.S. at 323. Because exigent circumstances justified the officer's presence

in the apartment, the only questions were whether the manipulation of the turntable was a Fourth Amendment search and, if so, what degree of individualized suspicion was necessary. The Court held that the nudge was a search that required probable cause, *id.* at 326-328, and in so holding dismissed the suggestion that the nudge "was a 'cursory inspection' instead of a 'full-blown search,' and could therefore be justified by reasonable suspicion rather than probable cause," *id.* at 328. The Court explained:

> We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain view' inspection nor yet a 'full-blown search.' Nothing in the prior opinions of this Court supports such a distinction * * * .

Id. at 328-329.

As in *Hicks*, the Court should decline to establish an intermediate "almost, but not quite, a search" category of police conduct. "A search is a search," *id.* at 325, a non-search is a non-search, and nothing lies in between. When police action is neither a search nor a seizure, it requires no Fourth Amendment justification, not even reasonable suspicion.

II. A Canine Sniff Does Not Expand The Scope Of A Traffic Stop In A Manner Requiring Reasonable Suspicion.

Because there was probable cause to pull over respondent for speeding, it is beyond dispute that the police were entitled to approach his car. Settled law holds that when police officers, positioned at a lawful vantage point, discover facts without effecting an additional search or seizure, the discovery does not intrude upon legitimate Fourth Amendment interests. See *Minnesota v. Dickerson*, 508 U.S. 366, 374-375 (1993); *Horton*

v. California, 496 U.S. 128, 133 n.5, 141 (1990); *Hicks*, 480 U.S. at 325. Consequently, because the exterior canine sniff of respondent's car was not a search, it did not improperly expand the scope of his traffic stop.

In arguing the contrary (Resp. Br. 23-34), respondent mischaracterizes our position. According to respondent, our position is that "the existence of probable cause to seize an individual to address one offense gives officers *carte blanche* to expand the scope of that seizure to include any other sort of investigation that they might choose to undertake." Resp. Br. 26; see also ACLU Br. 9-10 ("In the State's view, a valid stop confers a kind of 'wild card' upon the police."). Not so. Of course the Fourth Amendment limits the scope of police conduct at probable cause-based traffic stops. But those limits apply *only* to conduct that effects an incremental search or seizure, meaning a search or seizure *beyond* the seizure already effected by the traffic stop. The Fourth Amendment does not constrain, and demands no justification for, police conduct that effects no incremental search or seizure.

Therein lies the distinction between this case and the series of precedents upon which respondent and his amici rely. Resp. Br. 24-29; NACDL Br. 17-20; ACLU Br. 10-11, 24-25. Those precedents hold that the police conduct in question, which took place at a lawful traffic stop, required some independent Fourth Amendment justification. See, *e.g.*, *Maryland v. Wilson*, 519 U.S. 408 (1997) (passenger ordered to exit car); *Knowles v. Iowa*, 525 U.S. 113 (1996) (search of car for drugs); *Michigan v. Long*, 463 U.S. 1032 (1983) (protective search of car's interior); *New York v. Belton*, 453 U.S. 454 (1981) (search of car incident to arrest of driver); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (driver ordered to exit car); cf. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. ___, 124 S. Ct. 2451 (2004) (individual arrested upon refusing to provide identification at *Terry* stop). Importantly, the police action in each case

consisted of an incremental search or seizure, which is precisely why some independent Fourth Amendment justification — independent, that is, of the justification for initiating the traffic stop — was required.[1] No such justification is required for police conduct at a lawful traffic stop, such as a canine sniff, that effects no incremental search or seizure. See *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion) ("beyond dispute" that no Fourth Amendment "search" occurred when police officer, at driver's license checkpoint, "shin[ed] his flashlight to illuminate the interior of [the defendant's] car"); see also *United States v. Dunn*, 480 U.S. 294, 304-305 (1987) (no search occurred when officers shined a flashlight through the open front of the defendant's barn) (citing with approval *Brown*, 460 U.S. at 739-740).

Respondent contends that this conclusion is inconsistent with the holding of *Terry*, 392 U.S. at 29, that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." According to respondent, because Officer Graham's use of a drug-detection dog bore no reasonable relation to the purpose for the traffic stop, the sniff violated *Terry*. Resp. Br. 24-26.

This argument fails as an initial matter because *Terry* does not govern police action at probable cause-based traffic stops. We considered this point at length in our opening brief. Pet. Br. 12-17; see also Ark. Br. 7-13; U.S. Br. 14-17. Respondent does not directly address any of the three grounds we offered (Pet.

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[1] The Fourth Amendment justification required in these cases took one of three forms: a case-by-case determination of probable cause (as in *Knowles*), a case-by case determination of reasonable suspicion (as in *Long*), or a categorical balance of burdens and benefits governing all similar circumstances (as in *Wilson*, *Belton*, *Mimms* and *Hiibel*).

Br. 15-17) as to why the *Terry* doctrine is incompatible with probable cause-based stops. Nor does respondent dispute our showing (Pet. Br. 12-15) that the Illinois Supreme Court incorrectly read this Court's precedents — including *Mimms*, 434 U.S. at 111-112, *Long*, 463 U.S. at 1047-1052, and *Berkemer v. McCarthy*, 468 U.S. 420, 439 (1984) — as requiring a *Terry* analysis at lawful traffic stops. Indeed, despite spending several pages on the subject, respondent offers no affirmative reason why the *Terry* doctrine should govern police action at a probable cause-based stop. Resp. Br. 24-26, 30-32.

Even if *Terry* governed, the exterior canine sniff of respondent's car still would pass Fourth Amendment muster. As respondent notes, *Terry* held that "'evidence may not be introduced if it was discovered *by means of a seizure and search* which were not reasonably related in scope to the justification for their initiation.'" Resp Br. 24 (quoting *Terry*, 392 U.S. at 29) (emphasis supplied). Thus, the *Terry* reasonable relationship test governs only those discoveries made "by means of a search and seizure." As we have shown, a canine sniff is neither a search nor a seizure, and thus could not possibly have run afoul of that test. See *United States v. Hensley*, 469 U.S. 221, 224 (1985) (no Fourth Amendment violation where, during investigatory stop of vehicle, officer observed butt of revolver protruding from underneath passenger's seat); *Long*, 463 U.S. at 1036 (same where officer discovered bag of marijuana under arm rest); Pet. Br. 17-18; U.S. Br. 17-19.

Respondent offers that the Fourth Amendment calculus might have been different "if the officer who stopped [respondent] happened to have a drug dog along, and the dog alerted when the officer pulled along side [respondent's] car." Resp. Br. 16. What makes this case different, respondent says, is that Trooper Graham, "hearing about a traffic stop made by

a different officer [Trooper Gillette], dr[ove] his dog to the scene for the specific purpose of sniffing the stopped car to check for drugs." *Ibid.* Thus, respondent's principal concern appears to be not that a dog sniffed his car, or that the sniff occurred at a traffic stop, but rather that the police brought the dog to his traffic stop in order to determine whether he was transporting drugs.

This passage in respondent's brief is crucial, for it reveals what really troubles him — and what likely troubled the Illinois Supreme Court — about this case. See Pet. App. 4a (noting that "calling in a canine unit unjustifiably broadened the scope of an otherwise routine traffic stop into a drug investigation."). Trooper Graham was not simply going about his business at the traffic stop when he accidentally discovered that respondent was transporting drugs. Rather, Graham took affirmative steps, unrelated to the justification for the stop, for the express purpose of determining whether drugs were present. This characterization of Trooper Graham's actions and motives, while accurate, is irrelevant. The Fourth Amendment is indifferent as to whether the police discover incriminating facts inadvertently or intentionally. See *Horton*, 496 U.S. at 141-142; *California v. Ciarolo*, 476 U.S. 207, 212-214 (1986); Pet. Br. 10-11 (discussing *Horton*). What matters, rather, is whether the discovery is the product of an incremental search or seizure. See *Hicks*, 480 U.S. at 325. Because a canine sniff effects neither a search nor a seizure, the sniff of respondent's car did not implicate, let alone violate, the Fourth Amendment.

For these reasons, conducting a canine sniff at a lawful traffic stop does not expand the scope of the stop in a manner requiring reasonable suspicion.

III. Respondent's Other Arguments Are Without Merit.

Respondent offers other arguments to support his view that the exterior canine sniff of his car required reasonable suspicion. All are red herrings, and none has merit.

A. First, respondent and his amici charge that canine sniffs are unreliable and result in an unacceptable number of false positives. Resp. Br. 18-20; NACDL Br. 10-12; ACLU Br. 5-6, 29-30. , However, research shows that canine sniffs are generally reliable and that the incidence of false positives is generally low.[2] Agreement with our point comes from an unlikely source — the one law review article cited by respondent and his amici on the subject of canine sniff reliability. While acknowledging that false positives do occur, the article concluded that,

> [a]s a whole, law enforcement provides careful training to its dog and handler teams. State, regional, and national organizations set rigorous standards for certification and management. These requirements usually produce very effective narcotics detection teams, who show extraordinary accuracy during both training and real life sniffs.

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[2] See, *e.g.*, Garner, et al., Duty Cycle of the Detector Dog: A Baseline Study (2001) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/dutycycle.pdf); Williams, et al., Canine Substance Detection: Operational Capabilities (1999) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/k-9_det_capabilities.pdf); Waggoner, et al., Effects of Extraneous Odors on Canine Detection (1998) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/extraneous_odors.pdf); Waggoner, et al., *Canine olfactory sensitivity to cocaine hydrochloride and methyl benzoate*, in Pilon & Burmeister (eds.), CHEMISTRY- AND BIOLOGY-BASED TECHNOLOGIES FOR CONTRABAND DETECTION (1997).

Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 432 (1997). Cf. *ibid.* ("The narcotics detection dog has been an essential tool in fighting the war on drugs. Canine alerts have resulted in countless seizures of illegal narcotics. Without them, fighting the tide of narcotics trafficking would be significantly more difficult.").

In any event, the debate over false positives is moot for purposes of this case. The reliability of canine sniffs pertains not to the question presented here — whether the Fourth Amendment requires reasonable suspicion to conduct an exterior sniff of a car at a lawful traffic stop — but only to an issue not presented here — whether a positive alert by the dog provides probable cause to actually search the car.[3]

An example illustrates why the two issues are distinct. A motorist's use of a fragrant masking agent, standing alone, might not provide probable cause to believe that the motorist is

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[3] On the probable cause issue, this Court and others have consistently held that a positive alert by a properly trained dog is sufficient to establish probable cause that drugs are present. See, *e.g.*, *Florida v. Royer*, 460 U.S. 491, 505-506 (1983) (plurality opinion); *United States v. Limares*, 269 F.3d 794, 797-798 (7th Cir. 2001) (recognizing that "[i]t is inevitable that *some* molecules of drugs will adhere to *every* Federal Reserve note," and noting the consequent "*potential* to increase the rate of false positives," but holding that a positive alert by a dog who was "right 62% of the time [is] enough to" establish probable cause) (emphasis in original); *Wallace v. State*, 372 Md. 137, 146, 812 A.2d 291, 297 (2002), cert. denied, 124 S. Ct. 1036 (2004). For a comprehensive review of how state and federal courts evaluate a dog's reliability and training in determining whether an alert by that dog provided probable cause, see *State v. Nguyen*, 157 Ohio App. 3d 482, 488-499, 811 N.E.2d 1180, 1185-1193 (2004) (citing cases), app. denied, ___ Ohio St. 3d ___, ___ N.E.2d ___ (No. 2004-1137) (Oct. 13, 2004).

transporting drugs. See *United States v. Villa-Chaparro*, 115 F.3d 797, 802 (10th Cir.), cert. denied, 522 U.S. 926 (1997). But that surely does not mean that an officer's visual or olfactory observation of the fragrance is, in itself, a search or quasi-search requiring some independent Fourth Amendment justification. Likewise, even if (contrary to fact) canine sniffs were unreliable indicators of the presence of drugs, it would mean only that a positive alert might not provide probable cause to conduct an actual search, not that the sniff itself required some level of individualized suspicion. Cf. *Dickerson*, 508 U.S. at 376 ("Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband.").

B. Respondent and his amici also suggest that allowing external canine sniffs of vehicles at lawful traffic stops, without reasonable suspicion that drugs are present, will facilitate racial profiling. Resp. Br. 17; NACDL Br. 8; ACLU Br. 13. This suggestion ignores *Whren v. United States*, 517 U.S. 806, 813 (1996), which establishes that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." There being no equal protection claim here — or even any hint that respondent was pulled over because of his race or ethnicity — respondent's racial profiling argument is irrelevant to this case.[4]

C. Respondent's amici maintain that a canine sniff invariably increases the duration of a traffic stop and thereby causes an unlawful seizure. NACDL Br. 5, 15; ACLU Br. 4,

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[4] The State of Illinois does not condone the racial profiling of motorists, and has taken steps to ensure that any such profiling is exposed and eliminated at the state and local level. See 625 ILCS 5/11-212; see also 50 ILCS 705/7(a); 20 ILCS 2605/2605-85.

20-22. Duration, like racial profiling, is not an issue here. In finding that the canine sniff of respondent's car violated the Fourth Amendment, the Illinois Supreme Court did not cite the *duration* of stop; it held only that the sniff impermissibly broadened the *scope* of the stop. Pet. App. 4a-5a ("the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff"); see also Reply in Supp. of Pet. for Cert. 1-2; U.S. Br. 19-20. Even respondent admits that duration had no bearing upon the decision below. Resp. Br. 34 n.12. Some future case might present the question whether the Fourth Amendment prohibits detaining a vehicle after the conclusion of a traffic stop for the purpose of conducting a canine sniff, see Pet. for Cert. 7 n.* (noting split among lower courts), but this is not that case.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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No. 03-923

In the Supreme Court of the United States

STATE OF ILLINOIS, PETITIONER

v.

ROY I. CABALLES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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v.

ROY I. CABALLES

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether officers must have reasonable, articulable suspicion of a narcotics crime before having a dog sniff a car to determine the presence of narcotics during the course of a legitimate traffic stop. Because the United States uses trained canines to detect concealed weapons and persons in stopped vehicles, and because the government prosecutes cases in which evidence from dog-sniff tests is developed by state authorities, the Court's resolution of that question will affect federal criminal investigations and prosecutions.

STATEMENT

1. On November 12, 1998, at approximately 5 p.m., Illinois State Trooper Daniel Gillette stopped respondent on Interstate Route 80 in La Salle County, Illinois, for driving 71 miles per hour in a 65 mile per hour zone. Gillette radioed the police dispatcher to say that he was making the stop and to ask for a check on respondent's license plates. Hearing the radio transmission, a second trooper, Craig Graham, departed for the scene with his drug-detection dog. Pet. App. 1a, 12a.

Once Gillette pulled over respondent's vehicle, he informed respondent that he had been speeding and asked to see his driver's license, vehicle registration, and proof of insurance. Respondent complied. Gillette noticed an atlas on the front seat, an open ashtray, the smell of air freshener, and a pair of suits hanging in the back without any other luggage. Gillette told respondent to reposition his vehicle out of traffic on the shoulder of the road and then to come back to the police car. After both vehicles were moved away from traffic, respondent entered the patrol car and was told by Gillette that he would be receiving a warning ticket. Gillette then radioed the police dispatcher to check on the validity of respondent's driver's license and to check for outstanding warrants. Pet. App. 2a, 12a.

While waiting to hear back from the dispatcher, Gillette asked respondent about his destination and what Gillette had observed was respondent's "dressed up" attire. Respondent replied that he was moving from Las Vegas to Chicago, and that he was dressed up because he was a salesman, although currently unemployed. Respondent was nervous and continued to be nervous even after being told that he would be issued

only a warning, which Gillette found unusual. Pet. App. 2a, 12a-13a.

At 5:09:58, the dispatcher advised Gillette that respondent had surrendered a valid Illinois driver's license to Nevada and, at 5:11:58, the dispatcher confirmed the validity of respondent's Nevada driver's license. Gillette immediately requested respondent's criminal history from the dispatcher. Gillette next requested respondent's permission to search his vehicle, but respondent refused. Gillette asked whether respondent had ever been arrested, and respondent said that he had not. At 5:12:42, the dispatcher advised Gillette that respondent had two prior arrests for marijuana distribution. Gillette began to write the warning ticket. While writing the ticket, Gillette was interrupted by another officer calling him on the radio about an unrelated matter. Pet. App. 2a, 13a, 17a n.1.

Also during the time Gillette was writing the ticket, Trooper Graham arrived and started walking his dog around respondent's vehicle. At approximately 5:13, while Gillette was still writing the ticket, Graham informed Gillette that the dog alerted at respondent's trunk. Gillette then searched the trunk and found marijuana. At 5:15, Gillette changed the activity code for the stop to a narcotics investigation. Respondent was arrested and taken to the police station. Pet. App. 3a, 13a, 24a.

2. Respondent was charged with one count of cannabis trafficking, in violation of 720 Ill. Comp. Stat. Ann. 550/5.1(a) (West 1998). He filed a motion to suppress the seized drug evidence and to quash the arrest. The trial court denied the motion and, after a stipulated bench trial, found respondent guilty. The court sentenced him to 12 years of imprisonment and a $256,136 fine. Pet. App. 3a, 13a-14a.

3. The Appellate Court of Illinois affirmed. Pet. App. 11a-19a. The court rejected respondent's argument that the delay occasioned by Officer Gillette's request for a criminal-history check on respondent—the 44-second period between the time the dispatcher confirmed the validity of respondent's Nevada driver's license and the time Gillette received respondent's criminal history—unreasonably extended the period of the detention. *Id.* at 16a-17a. The court held that the delay was "*de minimis*," and that it "was not an unreasonable delay under the totality of the circumstances." *Id.* at 17a. The court further held that the police did not need reasonable suspicion to justify the canine sniff. *Id.* at 3a, 18a n.2.

4. a. The Supreme Court of Illinois reversed by a 4-3 vote. Pet. App. 1a-6a. The court held that, although the traffic stop in this case was based on probable cause, the reasonableness of the stop had to be determined under the "principles" of *Terry* v. *Ohio*, 392 U.S. 1 (1968). Pet. App. 3a-4a. The majority relied on its earlier decision in *People* v. *Cox*, 782 N.E. 2d 275, 280 (Ill. 2002), cert. denied, 123 S. Ct. 2574 (2003), in which it had held that the police had impermissibly extended both the duration and the scope of a traffic stop by using a drug-sniffing dog that arrived on the scene 15 minutes after the initial detention. *Ibid.* The *Cox* court concluded that the police erred because they "did not have 'specific and articulable facts which, taken together with rational inferences therefrom,' reasonably warranted an extended detention of defendant's vehicle, and the ensuing drug-sniff test." *Id.* at 281.

In this case, the court concluded that, although it was undisputed that the traffic stop was properly initiated, "the police impermissibly broadened the scope of the traffic stop * * * into a drug investigation because

there were no specific and articulable facts to support the use of a canine sniff." Pet. App. 4a-5a. In particular, the majority stated that "[t]he police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs." *Id.* at 4a. The majority added that the trooper's observations concerning respondent—that he said he was moving from one state to another but had little visible luggage; that the car smelled of air freshener; that he was dressed for business but was driving across the country while unemployed; and that he seemed unusually nervous—were insufficient viewed singularly or collectively to "support a canine sniff." *Id.* at 5a.

b. Justice Thomas filed a dissenting opinion. Pet. App. 6a-10a. He argued that *Cox*'s conclusion that the police may not conduct a dog sniff of a vehicle absent reasonable suspicion was dicta that conflicts with this Court's decisions holding that a canine sniff is not a search and that walking a narcotics-detection dog around the exterior of a vehicle does not transform a legitimate seizure of a vehicle into a search. *Id.* at 7a (citing *United States* v. *Place*, 462 U.S. 696, 707 (1983), and *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000)). The dissent argued that if a dog sniff were in fact a search, the majority's conclusion that the search was permissible on the basis of reasonable suspicion was in error because probable cause is required to conduct a warrantless search of a vehicle. *Id.* at 9a-10a.

SUMMARY OF ARGUMENT

The traffic stop of respondent, including the dog sniff, was not an unreasonable search or seizure under the Fourth Amendment. Although the traffic stop was undoubtedly a "seizure" of respondent, it was constitutionally valid because it was supported by probable

cause to believe that respondent had violated state traffic laws. And there was no unreasonable "search" in this case, because this Court's cases establish that a dog sniff of a vehicle is not a search under the Fourth Amendment at all. As the Court has explained in *United States* v. *Place*, 462 U.S. 696 (1983), and *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), a dog sniff does not intrude upon legitimate expectations of privacy because it does not invade a protected place, it reveals only very limited information about the presence of contraband drugs, and it does not cause undue embarrassment or inconvenience. That conclusion is reinforced when the dog sniff is directed toward a vehicle, which this Court has long recognized is the subject of a diminished expectation of privacy.

Nor did the manner of conducting the seizure in this case render it unreasonable under the Fourth Amendment. A search and seizure that is conducted in such a way as to make an exceptional intrusion into privacy or property interests protected by the Fourth Amendment may be found to be unreasonable. But, precisely because a dog sniff does not intrude into privacy or property interests protected by the Fourth Amendment, its use during an otherwise reasonable traffic stop cannot convert the stop into an unreasonable search or seizure under the Fourth Amendment.

The Illinois Supreme Court held that the permissible scope of the traffic stop in this case was governed by the principles of *Terry* v. *Ohio*, *supra*, and it held that the dog sniff unjustifiably broadened that scope by converting the stop into a drug investigation without reasonable suspicion. The traffic stop in this case, however, was a probable-cause stop based on an observed violation of law, not a reasonable-suspicion stop subject to the scope limitations of *Terry*. Accordingly, the reasonableness of the stop does not depend on whether it satisfies the scope limitations of the *Terry* doctrine.

Even if viewed as a *Terry* stop, the traffic stop in this case would satisfy Fourth Amendment standards. In conducting a *Terry* stop, law enforcement agents may intrude on privacy and property interests protected by the Fourth Amendment only insofar as is reasonable to confirm or dispel their reasonable suspicions. Under *Place* and *Edmond*, however, the dog sniff of respondent's vehicle did not intrude on respondent's legitimate expectations of privacy or on his property interests at all. Contrary to the Illinois Supreme Court's view, the fact that law enforcement agents during a traffic stop may engage in conduct, such as a dog sniff, that does *not* intrude on protected Fourth Amendment interests does not broaden the scope of the stop. Even if viewed as a *Terry* stop, therefore, the stop in this case was not unreasonably broad.

Respondents have argued that the traffic stop in this case was unconstitutional because its duration was unreasonably extended. The Illinois Supreme Court, however, did not examine the duration of the traffic stop in this case, and that court's recitation of the facts establishes, to the contrary, that the dog sniff did not extend the duration of the stop. The entire stop, from inception to the time the marijuana was discovered, took less than nine minutes, well within the reasonable time period for a routine traffic stop.

ARGUMENT

A DOG SNIFF DURING THE COURSE OF A LAWFUL TRAFFIC STOP IS VALID UNDER THE FOURTH AMENDMENT WITHOUT ANY REQUIREMENT OF REASONABLE SUSPICION

The Fourth Amendment's prohibition on the violation of the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," U.S. Const. Amend. IV, serves to protect "two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." See *United States* v. *Jacobsen*, 466 U.S. 109, 112 (1984). "[A] seizure deprives the individual of dominion over his or her person or property." *Horton* v. *California*, 496 U.S. 128, 133 (1990); see *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). Because the dog sniff of respondent's car was neither an unreasonable search nor an unreasonable seizure, it did not violate the Fourth Amendment.

A. The Seizure Of Respondent Was Supported By Probable Cause And Therefore Permissible

Respondent was undoubtedly "seized" under the Fourth Amendment when he was stopped for a traffic violation, but that seizure was permissible. As this Court has explained, "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of" the Fourth Amendment. *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996). But "[t]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 810. In this case, Trooper Gillette himself observed respondent exceeding the speed limit. Pet. App. 1a, 12a. Accordingly, he had probable cause to stop the vehicle. The resulting seizure of respondent and the vehicle was reasonable, and therefore permissible, under the Fourth Amendment.

B. The Dog Sniff Of Respondent's Car Was Not A "Search" Under The Fourth Amendment

There was also no unreasonable "search" in this case, because the dog sniff of respondent's car is not a "search" under the Fourth Amendment at all. Although respondent may have expected that the marijuana in his car would not be discovered, "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of authorities." *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984). This Court's cases establish that, because a dog sniff of a vehicle does not interfere with a legitimate expectation of privacy under the Fourth Amendment, the dog sniff of respondent's vehicle was not a "search" subject to the Amendment's requirements.

1. In *United States* v. *Place*, 462 U.S. 696 (1983), agents arranged for a narcotics detection dog to sniff a suitcase that they had seized at an airport. The Court noted that "if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test * * * could not be justified on less than probable cause." *Id.* at 706. The Court held, however, that probable cause was unnecessary, because "the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage,

which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.* at 707.

The Court reached that conclusion based on an analysis of the particular features of a dog sniff. The Court recognized that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." 462 U.S. at 707. But a canine sniff "does not require opening the luggage," it "does not expose noncontraband items that otherwise would remain hidden from public view," and it "discloses only the presence or absence of narcotics, a contraband item." *Ibid.* Moreover, it does not cause "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Ibid.* Because the canine sniff "is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," the Court concluded that it was not a search under the Fourth Amendment. *Ibid*; see *Jacobsen*, 466 U.S. at 123 (citing *Place* and holding that chemical test "that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest").

2. In *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), the Court applied that reasoning to a dog sniff of a car conducted, as here, without any individualized suspicion. In *Edmond*, police officers set up a traffic checkpoint to interdict unlawful drugs, and dog sniffs were performed on cars stopped at the checkpoint. *Id.* at 35. The Court held that the checkpoint constituted a seizure under the Fourth Amendment, which the Court ultimately held to be unconstitutional because not accompanied by some measure of individualized suspicion. *Id.* at 41. But the Court expressly rejected the argument that the dog sniff was a search subject to Fourth Amendment standards. To the contrary, the Court held that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car * * * does not transform the seizure into a search." *Id.* at 40 (citing *Place*). That is because "an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Ibid.*[1]

3. Under *Place* and *Edmond*, the dog sniff of the car in this case is not a Fourth Amendment "search." As in those cases, the dog sniff did not intrude into the interior of the item searched, it did not reveal noncontraband items not ordinarily exposed to public view, it provided only limited information about the presence of contraband drugs, and it did not cause the owner embarrassment or even inconvenience. That is sufficient to establish that, just as in *Place* or *Edmond*, the Fourth Amendment does not require police officers to have an independent justification, in the form of particularized suspicion, before having a dog sniff a motor vehicle during the course of a lawful traffic stop.

That conclusion is reinforced by this Court's long "recogni[tion] that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein." *New York* v. *Class*, 475 U.S. 106, 112 (1986); see *Illinois* v. *Lidster*, 124 S. Ct. 885, 889

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[1] This Court's holding in *Kyllo* v. *United States*, 533 U.S. 27 (2001), that use of a thermal-imaging device to detect the heat radiating from a house was a "search" under the Fourth Amendment is not to the contrary, both because *Kyllo* involved the "interior of the home," *id.* at 34, an area where "privacy expectations are most heightened," *id.* at 33, and because *Kyllo* involved the use of technology that did not merely reveal the presence of contraband, see *id.* at 35-36.

(2004); *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999); *California* v. *Carney*, 471 U.S. 386, 391-392 (1985). Cars are used on public streets and are subject to pervasive governmental regulation. The car in this case was stationed on the side of a public highway when the dog sniff took place. Car owners do not have a reasonable expectation that they could prevent dogs from sniffing their vehicles located on public streets. Cf. *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 238 (1986). For that reason, too, a dog sniff does not constitute a "search" under the Fourth Amendment and does not require an independent justification.[2]

C. The Dog Sniff Did Not Render The Manner Of Conducting The Seizure Unreasonable

Even a search or seizure that is reasonable at its inception may be conducted in such a fashion as to violate

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[2] The courts of appeals have generally agreed that, because a dog sniff is not a search, a dog sniff on the exterior of a stopped vehicle need not be justified by a showing of reasonable suspicion that the sniff will uncover evidence of illegal activity. See *Merrett* v. *Moore*, 58 F.3d 1547, 1553 (11th Cir. 1995) (rejecting argument that the use of dogs to sniff the exterior of cars at a roadblock without an individualized reasonable suspicion of drug-related criminal activity amounted to an unconstitutional search), cert. denied, 519 U.S. 812 (1996); *United States* v. *Seals*, 987 F.2d 1102, 1106 (5th Cir.) ("We hold that the dog sniff, under these circumstances, is not a 'search' within the meaning of the Fourth Amendment and therefore an individualized reasonable suspicion of drug-related criminal activity is not required when the dog sniff is employed during a lawful seizure of the vehicle."), cert. denied, 510 U.S. 853 (1993); *United States* v. *Rodriguez-Morales*, 929 F.2d 780, 788-789 (1st Cir. 1991) (distinguishing earlier case and holding that "[s]o long as the automobile is lawfully impounded, the canine sniff test can be performed without any showing of reasonable suspicion"), cert. denied, 502 U.S. 1030 (1992); *United States* v. *Morales-Zamora*, 914 F.2d 200, 203 (10th Cir. 1990).

the Fourth Amendment. Where a search or seizure is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests," the Fourth Amendment requires a balancing of interests to determine whether the search or seizure was nonetheless "reasonable." *Whren* v. *United States*, 517 U.S. 806, 819 (1996). "[T]he question whether a search or seizure is 'extraordinary' turns, above all else, on the manner in which the search or seizure is executed." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001). As examples of cases in which such a further inquiry into the manner of conducting a search is necessary, the Court in *Atwater* and *Whren* listed seizure by means of deadly force, see *Tennessee* v. *Garner*, 471 U.S. 1 (1985); unannounced entry into a home; see *Wilson* v. *Arkansas*, 514 U.S. 927 (1995), entry into a home without a warrant; see *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984); and physical penetration of the body, see *Winston* v. *Lee*, 470 U.S. 753 (1985). See also *Atwater*, 532 U.S. at 354; *Whren*, 517 U.S. at 818.

Where a search or seizure does not involve such an exceptional degree of intrusion into privacy or physical interests protected by the Fourth Amendment, no special inquiry into the manner of conducting a search or seizure is necessary. That is the case here, because a dog sniff does not constitute such an exceptional intrusion. This Court has made clear that a dog sniff of a vehicle is not a "search" at all. See *City of Indianapolis* v. *Edmond*, *supra*. It follows that a dog sniff cannot be an exceptional intrusion into constitutionally protected privacy interests. Nor does a dog sniff involve any intrusion on the owner's protected interests in dominion over his or her person or property. Accordingly, the fact that a dog sniff is conducted during a traffic stop does not call into question the manner of conducting the

stop, and it therefore does not suggest that the stop has become "unreasonable" under the Fourth Amendment.

D. The Dog Sniff Did Not Convert The Traffic Stop In This Case Into An Impermissible *Terry* Stop

The Illinois Supreme Court determined that it must apply the "test adopted in *Terry* v. *Ohio* * * * to determine the overall reasonableness of the stop" in this case. Pet. App. 3a. Applying *Terry*, the court concluded that the dog sniff "impermissibly broadened the scope of the traffic stop in this case into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff." *Id.* at 4a-5a (citing *People* v. *Cox*, 782 N.E.2d 275, 280 (Ill. 2002), cert. denied, 123 S. Ct. 2574 (2003)). The court erred because the traffic stop in this case was not a reasonable-suspicion *Terry* stop and because, even if the principles of *Terry* governed, the stop in this case would have been permissible.

1. *The traffic stop was not subject to the limitations of a Terry stop.*

a. The traffic stop in this case was not a *Terry* stop, and it was not subject to the limitations applicable to the scope of such stops. Under *Terry*, an "officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, No. 03-5554 (June 21, 2004), slip op. 6. In this case, Trooper Gillette had probable cause—indeed, a particularly clear form of probable cause—to stop respondent, because he had observed respondent violating the traffic laws by exceeding the speed limit. Accordingly, the stop in this case was a probable-cause stop based on an observed violation of the law, not a reasonable-suspicion stop subject to the scope limitations of the *Terry* doctrine.

b. Although this Court has analogized traffic stops to *Terry* stops for some purposes, those cases do not suggest that a traffic stop is impermissible if it does not conform to *Terry*'s limitations. In *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984), this Court noted that a traffic stop is analogous to a *Terry* stop in its brief duration and non-police dominated atmosphere. The Court reasoned that "[t]he comparatively nonthreatening character of detentions of this sort" supports the conclusion that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)]." 468 U.S. at 440. But the Court was careful to explain that "[n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." *Id.* at 439 n.29. The Court added that it "of course do[es] not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Ibid.*[3] *Berkemer* accordingly

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[3] Two courts of appeals have held that the permissible scope of questioning during a traffic stop based on probable cause is broader than for a stop based on reasonable suspicion. See *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), cert. denied, 528 U.S. 1161 (2000); *United States* v. *Childs*, 277 F.3d 947 (7th Cir.) (en banc), cert. denied, 537 U.S. 829 (2002); but see *United States* v. *Holt*, 264 F.3d 1215, 1217, 1230 (10th Cir. 2001) (en banc) (finding that traffic stops should be analyzed under *Terry* regardless of whether based on probable cause or reasonable suspicion). A similar question regarding the scope of questioning during a detention of occupants during execution of a search warrant, see *Michigan* v. *Summers*, 452 U.S. 692 (1981), is presented in *Muehler* v. *Mena*, cert. granted, No. 03-1423 (June 21, 2004).

expressly disavowed the proposition that a probable-cause traffic stop is subject to the limitations applicable to *Terry* stops based on reasonable suspicion.

The Illinois Supreme Court cited two cases from this Court in applying *Terry* limitations to the traffic stop in this case. See Pet. App. 4a. Neither case, however, supports the court's conclusion. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court held that, during a *Terry* stop of a suspect in a vehicle, police officers may undertake a protective search of the vehicle for weapons if they have reasonable suspicion that the suspect is potentially dangerous. *Id.* at 1051. The Court, however, made clear that the case involved "a protective search" following a *Terry* stop, "and not a search justified by probable cause to arrest for speeding, driving while intoxicated, or any other offense." *Id.* at 1035 n.1.

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), the Court relied on *Terry* for the proposition that police officers may take reasonable steps to protect their safety during a traffic stop (as during any other stop) of an individual, *id.* at 110, and the Court also held that the frisk of the motorist for weapons once a suspicious bulge had been observed was justified under *Terry*, *id.* at 111-112. The Court's brief per curiam opinion nowhere discusses whether a probable-cause traffic stop must be analyzed as a *Terry* stop, and the Court's holdings did not depend on a conclusion that a probable-cause traffic stop is subject to all of the same limitations as a *Terry* stop.

c. *Long* and *Mimms* accordingly do not support the Illinois Supreme Court's holding that a probable-cause traffic stop is subject to the scope limitations of a *Terry* stop, and *Berkemer* suggests to the contrary. That does not mean that a probable-cause traffic stop is subject to no Fourth Amendment limitations. See, *e.g.*,

Knowles v. *Iowa*, 525 U.S. 113, 117 (1998) (noting that a routine traffic stop "does not by itself justify the often considerably greater intrusion attending a full field-type search" incident to a custodial arrest). But probable cause is the "gold standard" under the Fourth Amendment, and its presence authorizes a more extensive intrusion than can be justified when only reasonable suspicion is present. See, *e.g.*, *Place*, 462 U.S. at 709 (noting that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive *as to be justifiable on reasonable suspicion*") (emphasis added); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975) ("Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest."). Accordingly, for the reasons given above, see pp. 8-14, *supra*, the probable-cause traffic stop in this case was "reasonable" under the Fourth Amendment, regardless of whether it exceeded the limitations on the proper scope of a *Terry* stop.

2. *Even viewed as a Terry stop, the stop here was permissible.*

a. In any event, even viewed as a *Terry* stop, the traffic stop in this case would satisfy Fourth Amendment standards. Under *Terry*, an investigatory stop based on reasonable suspicion must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. That "scope" limitation means that the police may intrude on protected Fourth Amendment interests only insofar as reasonable "to confirm or dispel their suspicions." *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985); see *Brignoni-Ponce*, 422 U.S. at 881-882

("further detention or search" beyond what is necessary to resolve suspicion "must be based on consent or probable cause").[4]

b. Under *Place* and *Edmond*, the dog sniff of respondent's vehicle was not an intrusion on respondent's reasonable expectation of privacy or on his exercise of dominion over his person and his possessions. Even under *Terry* standards, therefore, the dog sniff did not intrude on interests protected by the Fourth Amendment, and the Illinois Supreme Court erred in concluding that the dog sniff "impermissibly broadened the scope of the traffic stop in this case." Pet. App. 4a. Accordingly, even under *Terry*, the dog sniff would not have rendered the stop unconstitutional.

The Illinois Supreme Court's error resulted from its apparent belief that *any* action taken by a police officer during a *Terry* stop that does not directly relate to confirming or dispelling the officer's reasonable suspicion broadens the stop unjustifiably. The Fourth Amendment, however, is not concerned with establishing a general code of police conduct, but with protection of legitimate expectations of privacy and of interests in

[4] In *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, No. 03-5554 (June 21, 2004), the Court rejected the argument that a state law requiring suspects to identify themselves during a *Terry* stop "circumvents the probable cause requirement, in effect allowing an officer to arrest a person for being suspicious." Slip op. 9. The Court explained that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* at 10. The Court's statement in *Hiibel* does not suggest that everything a police officer does in the course of a *Terry* stop must be related to the purposes of the stop, even if the police officer's conduct (*i.e.*, asking a question or having a dog sniff a vehicle) does *not* intrude on protected Fourth Amendment interests.

the ability to exercise dominion over one's person and property. A *Terry* stop is thus "impermissibly broadened," in the court's terms, only if the officer takes action that intrudes on Fourth Amendment interests more than can be justified by the nature of the stop. See, *e.g.*, *Knowles*, 525 U.S. at 117-118; *Place*, 462 U.S. at 707-710. The fact that the officer may engage in other conduct—even conduct that could detect the possibility of an otherwise unrelated crime—that does *not* intrude on Fourth Amendment interests does not broaden the scope of a *Terry* stop or other Fourth Amendment search or seizure. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 812-813 (1996) (no violation of Fourth Amendment when narcotics were observed in car stopped for traffic violation); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (no violation of Fourth Amendment in plain-view discovery of marijuana during unrelated administrative boarding of vessel); *Colorado* v. *Bannister*, 449 U.S. 1 (1981) (per curiam) (plain-view seizure of stolen items observed during unrelated traffic stop permissible). Accordingly, it does not render the stop unconstitutional.

c. Respondent has argued (Br. in Opp. 6) that the traffic stop in this case was unconstitutional because "the troopers extended the duration of the traffic stop" in a way that was unjustified under *Terry*. Respondent is mistaken. In the current posture of this case, it must be assumed that the duration of the traffic stop was reasonable and within the limits set by *Terry*.

First, the Illinois Supreme Court did not conclude that the dog sniff extended the duration of the traffic stop at all. To the contrary, the facts recited by the court—that Trooper Gillette "was still writing the warning ticket when Trooper Graham arrived with his drug-detection dog and began walking around defen-

dant's car," Pet. App. 3a—establish that the dog sniff did not increase the duration of the stop. And the court squarely rested its ultimate decision not on any increase in the length of the stop caused by the dog sniff, but on the principle that "the State has not offered sufficient justification for implementing a canine sniff" and that such a sniff "impermissibly broadened the scope of the traffic stop into a drug investigation." *Id.* at 4a. The question before this Court concerns the permissibility of a dog sniff during a traffic stop, not whether the duration of the traffic stop in this case was extended unreasonably.

Moreover, if anything extended the duration of the stop, it was not the dog sniff, but the various steps taken by Trooper Gillette during the stop, such as radio checks on the validity of respondent's license, the presence of outstanding warrants, and respondent's criminal history, and brief questioning of defendant's purposes and mode of travel. Pet. App. 2a-3a. The Illinois Supreme Court, however, engaged in no analysis of whether those steps extended the duration of the traffic stop unjustifiably, and it reached no conclusion on that point.[5]

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[5] Although the Supreme Court of Illinois did not address the matter, the state court of appeals did address respondent's contention that Gillette called the dispatcher for a criminal history check as a delay tactic. The court found that the dispatcher responded to Gillette's request (immediately after which Gillette began writing the warning ticket) just 44 seconds after the request was made. Pet. App. 16a-17a. The court of appeals thus correctly concluded that any delay was *de minimis*. *Ibid.* See *United States* v. *Purcell*, 236 F.3d 1274, 1279 (11th Cir. 2001) ("[T]he request for the criminal histories prolonged the traffic stop, at most, by approximately three minutes. We conclude that this delay was *de minimis* in the context of the totality of the circumstances of this traffic stop."); cf. *United States* v. *Childs*, 277 F.3d 947, 953 (7th Cir.) (en banc) (finding that delay of license and warrant checks caused by officer speaking to passenger at traffic stop did not violate the Fourth Amendment because "[t]he extra time, if any, was short—not nearly enough to make the seizure 'unreasonable.'"), cert. denied, 537 U.S. 829 (2002); *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 648-649 (8th Cir. 1999), (holding that a two-minute delay for dog sniff was a *de minimis* intrusion), cert. denied, 528 U.S. 1161 (2000); *United States* v. *Morgan*, 270 F.3d 625, 631-632 (8th Cir.) (finding *de minimis* less than 10-minute delay caused by walking narcotics-detecting dog around vehicle), cert. denied, 537 U.S. 849 (2002).

Finally, the duration of the stop in this case did not violate the appropriate limits on *Terry* stops. In determining whether a detention is too prolonged to be justified as an investigative stop, this Court has looked to whether the police acted in a diligent and reasonable manner in pursuing their investigation. *Sharpe*, 470 U.S. at 686-687. In this case, the circumstances of respondent's stop suggest no lack of diligence or reasonableness on the part of the police. The entire stop, from inception to the time Trooper Gillette changed the activity code to a narcotics detention, took less than nine minutes. Pet. App. 17a. That is well within the reasonable time period for a routine traffic stop. See, *e.g.*, *Sharpe*, 470 U.S. at 683 (finding 20-minute investigative stop reasonable under circumstances of the case); cf. *Place*, 462 U.S. at 709-710 (90-minute detention of luggage too long under circumstances of the case).[6] The steps the officer took in determining the appropriate course to take were reasonably related to the purposes of the stop—the decision whether to issue a traffic

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[6] See *Purcell*, 236 F.3d at 1278-1279 (14-minute traffic stop held reasonable), cert. denied, 534 U.S. 830 (2001); *United States* v. *Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993) (noting that a computer check of a motorist's driver's license, insurance papers, and vehicle registration may take 15 minutes).

ticket or a warning citation or to take some other step to address the violation he had observed.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the protection of Fourth Amendment rights has been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment cases, both as counsel for a party immediately involved and as amicus curiae. The ACLU of Illinois is one of the ACLU's statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU, its affiliates, and its members.

STATEMENT OF THE CASE

On November 12, 1998, Illinois State Police Trooper Daniel Gillette stopped Respondent Roy I. Caballes for driving six miles above the speed limit on Interstate 80 in La Salle County, Illinois. (Pet. App. 1a.) Trooper Gillette radioed the police dispatcher that he was making a traffic stop. (*Id.*)

Another officer, Trooper Craig Graham of the State Police Drug Interdiction Team, overheard Gillette's radio transmission and advised the dispatcher that he was on his way to conduct a "canine sniff." (*Id.*) Gillette had not requested assistance. (*Id.*)

Gillette thereafter approached Caballes's car, informed him that he was speeding, and asked to see his driver's license,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person other than amici, their members or counsel, made any monetary contribution to the preparation or submission of this brief.

registration, and insurance card. (*Id.* at 2a.) Caballes complied with these requests. (*Id.*) Gillette noticed an atlas on the front seat, an open ashtray, the odor of air refresher, and two suits hanging in the back seat, but no other luggage. (*Id.*) Gillette told Caballes to move his car and then come to the squad car. (*Id.*) After Caballes did so, Gillette told him that he was only going to write a warning ticket. (*Id.*)

Gillette then called the dispatcher to ascertain the validity of Caballes's license and to do a warrant check. (*Id.*) While waiting for the results, Gillette questioned Caballes about where he was going and why he was "dressed up." (*Id.*) Caballes said he was moving from Las Vegas to Chicago, and that he usually "dressed up" because he was a salesman, but that he was unemployed. (*Id.*) According to Gillette, Caballes seemed nervous. (*Id.*)

The dispatcher told Gillette that Caballes had surrendered an Illinois license for a Nevada license. (*Id.*) Gillette then requested Caballes' criminal history from the dispatcher. (*Id.*) In the meantime, Gillette asked to search the car, but Caballes refused. (*Id.*) Gillette then asked Caballes whether he ever had been arrested, which Caballes denied. (*Id.*) The dispatcher reported that Caballes had two prior arrests for distribution of marijuana, and Gillette began writing the ticket, but was interrupted by an unrelated call. (*Id.* at 2a-3a.)

Gillette was still writing the warning ticket when Graham arrived and began walking around Caballes's car with his drug-detection dog. (*Id.* at 3a.) The dog alerted at the trunk of the car. (*Id.*) Gillette then searched the trunk and found marijuana. (*Id.*)

Caballes was taken to the police station and charged with one count of cannabis trafficking. (*Id.*) A motion to suppress was subsequently denied. (*Id.*) Caballes was tried

to the court sitting without a jury, sentenced to 12 years in prison, and ordered to pay a street value fine of $256,136. (*Id.*) The Illinois Appellate Court affirmed the conviction (*id.*), but the Supreme Court of Illinois reversed on the ground that Caballes's Fourth Amendment rights had been violated. (*Id.* at 1a.) The State of Illinois filed a petition for a writ of certiorari, which was granted on April 5, 2004.

SUMMARY OF ARGUMENT

In *Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court held that police violate the Fourth Amendment when they randomly stop automobiles and use trained dogs to try to discover illegal drugs. The question presented in this case is conceptually distinct, but practically related: Whether police likewise violate the Fourth Amendment when, having validly stopped a motorist for driving a few miles above the speed limit, for having a faulty muffler or tail-light, for failing to buckle up, or for some other routine traffic infraction not involving alcohol or a controlled substance, they expand the scope of that routine traffic stop to encompass a canine drug investigation. In short, does the mere existence of a traffic stop supported by probable cause justify the commencement of an intrusive, unrelated drug investigation that otherwise would violate the Fourth Amendment, absent independent justification?

This Court's prior cases show that the scope of a valid traffic stop that does not result in a custodial arrest may not be extended to include other investigations, such as a canine drug investigation, unless the police have grounds amounting to individualized suspicion for doing so. It is not enough that the initial traffic stop was justified; the use of drug-detection dogs must be independently justified. This is so because every traffic stop is a "seizure," and the Constitution requires that any activity that extends the scope of such a seizure must have an identifiable basis in the reason for the initial stop, in

the inherent authority of the police to secure their own safety, or in some specific circumstance that creates individualized suspicion.

The permissible scope of a routine traffic stop is clear: A motorist reasonably expects that she will be detained briefly while the police officer asks for her name, checks her driver's license, and properly documents her alleged violation. She also reasonably expects that she will then be allowed to resume her journey, without being subjected to an invasive, unrelated drug investigation.

The deployment of drug-detection dogs cannot be justified by the legitimate investigative needs of a routine traffic stop. A trained dog will add nothing to the evidence of a broken tail-light nor assist in resolving any mystery about the motorist's identity. But the use of such a dog necessarily broadens the scope of the stop. It takes the stop beyond its rationale and into new investigatory directions. It also alters the nature and quality of the stop. Dogs are neither antiseptic scientific devices nor demure creatures. They frighten people and have long been used for that purpose. Having one's car or person circled by a large unknown dog, trained in an unknown way, clearly alters the traffic stop. In addition, the use of a dog may well lengthen the duration of a stop. For example, a police officer might well question a motorist a little more slowly and a little more fully, or put questions to the dispatcher one at a time, rather than all at once, knowing that a canine unit is in the vicinity and on the way. Moreover, absent any logical connection between the commission of traffic infractions and drug possession, the use of dogs in routine traffic stops is arbitrary and subjects individuals to random public drug screenings.

The requirement that a canine drug investigation be justified independently from the stop proceeds from the constitutional imperative that every search or seizure be

reasonable, both at its inception and in the manner in which it is conducted. Absent independent justification, deploying a drug-detection dog in a routine traffic stop violates this principle because it unreasonably extends the scope of the stop. This use of dogs violates the Fourth Amendment for a second reason as well, namely, that it constitutes a search.

This Court affirmed a cornerstone principle of Fourth Amendment law when it observed in *Kyllo v. United States*, 533 U.S. 27 (2001), that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.* at 33, *citing Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). That statement serves to clarify that the answer to the question whether the deployment of a drug-detection dog constitutes a Fourth Amendment "search" will depend on the circumstances. Thus, it may not be a Fourth Amendment "search" for police officers to use a drug-detection dog to inspect luggage being transported between international airports. But the deployment of the same dog to investigate an automobile and its occupants, in the course of a routine traffic stop, will be deemed a "search" because the motorists' "expectation of privacy" in those circumstances is one that society recognizes as reasonable.

To the extent that a contrary rule might be grounded on the assumption that trained dogs operate with scientific precision, or that they can be counted on invariably to detect only unlawful activity (in which no one has a legitimate expectation of privacy), without ever uncovering facts about lawful activity that citizens have a right to keep secret, the assumption is incorrect. Indeed, research shows that the reliability of drug-detection dogs varies widely, based on several factors, including the degree of its training and the skill and attitude of its trainer. In addition, false alerts are more likely to occur where dogs are deployed without

individualized suspicion. When full searches are conducted on predictably false alerts, dogs will uncover facts that fall predictably within a citizen's legitimate expectation of privacy and deserve constitutional protection.

In a sense, this case narrowly involves the use of trained dogs in the context of individual automobile stops. In another sense, however, this case raises a more general question: the extent to which the use of any investigative tool will be deemed to comport with constitutional requirements in particular circumstances. For this reason, the specific circumstances are critical. Legitimate expectations of privacy are strongest, of course, when rooted in the home, weakest when the citizen is present in a public place such as airports, where the government's legitimate interest is significant. The nature of the specific investigative tool is also important, of course. While drug-detection dogs are involved here, other intrusive techniques, such as DNA testing and advanced imaging technologies, may very well be implicated by the Court's decision in this case. We also emphasize, contrary to the State's argument, that it makes little difference whether the appended investigative intrusion constitutes a "search" or is simply an extension of the scope of the initial stop. In either case, the relevant question is whether the government's use of a particular investigative tool bears an appropriate relationship to the government's original justification for the stop. If not, it must be independently justified based on individualized suspicion. When such individualized suspicion is lacking, as it was here, the Constitution does not allow the police to convert a routine traffic stop into an intrusive drug investigation.

ARGUMENT

I. By Changing The Nature, Quality And Duration Of A Simple Traffic Stop, The Deployment Of A Drug-Detection Dog Violates The Fourth Amendment By Extending The Stop Beyond Its Permissible Scope.

Millions of people in the United States drive automobiles every day. They go to work. They look for work. They go to church. They go shopping. They pick up their children at school and sports. They go to sporting events. They go to the movies. They go to the hospital. They take their neighbors to the doctor. They visit their lawyers. They travel to serve on juries.

Most of them, from time to time, drive a few miles over the speed limit. Some also have broken tail-lights or turn signals that they do not know about or are meaning to have fixed. Others forget to use their seat belts. Others forget that a right turn on a red light is not permitted at a particular intersection. Others sometimes fail to pull back into the right-hand lane after they have passed another car. Others miss a yield sign in an unfamiliar neighborhood.

Of course, a police officer would have probable cause to stop each of those motorists and issue a citation. The motorists understand that, and they expect to be detained briefly, while the officer asks for their names, checks their driver's licenses, and issues an appropriate citation. They reasonably expect that they will then be free to continue their journeys.

A motorist also reasonably expects not to be detained longer than necessary, not to be harassed, and not to have her trunk, let alone her person, searched, without individualized suspicion, and certainly not as a matter of routine. Nor does she expect to have her car or person sniffed for drugs simply because a canine officer with time on his hands has heard on

the police radio that "a motorist has been stopped" – for exceeding the speed limit, for having a faulty tail-light, or for changing lanes precipitously – and chooses to come unbidden to the scene. That is because the Fourth Amendment requires that a seizure be reasonable, both at its inception and in its conduct, and that the scope and conduct of the seizure be reasonably related to its rationale.

A. The Use of a Drug-Detection Dog During a Routine Traffic Stop is Wholly Unrelated to the Basis for the Stop and Requires Independent Justification.

When police detain a motorist for a traffic violation, a seizure is effectuated. *See Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). To pass muster under the Fourth Amendment, such a seizure must be shown to be reasonable, both in the sense of being justified at its inception and in the additional sense of being conducted in an appropriate manner. *See Prouse*, 440 U.S. at 654; *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). Thus, the encounter should be "limited," and the detention of a motorist "brief." *Berkemer*, 468 U.S. at 437. Most important, as this Court frequently has observed, such seizures must be limited in scope to the purpose that initially gave rise to the government intrusion. *See Hiibel v. Sixth Judicial District Court*, 124 S. Ct. 2451, 2458 (2004); *Berkemer*, 468 U.S. at 439; *Terry*, 392 U.S. at 28-29.

Though justified at its inception, therefore, even a traffic stop supported by probable cause will violate the Fourth Amendment if it is conducted in an unreasonable manner, or if its scope is extended beyond its rationale, without independent probable cause or reasonable suspicion to support the extension. A stop must be reasonable from beginning to end, and reasonableness depends as much on execution as on initial justification. *See United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry*, 392 U.S. at 28-29.

The use of a drug-detection dog necessarily extends the scope of a routine traffic stop, and, absent independent justification or consent, violates the Fourth Amendment.[2]

A drug-detection dog adds no value to the investigation of a simple traffic infraction. A trained dog cannot ascertain the speed at which a vehicle was traveling or the true state of an apparently broken tail-light, let alone the real identity of a detained motorist. Nor are the services of a drug-detection dog useful with respect to any of the other purposes for which a routine traffic stop may be made. What drug-detection dogs are used for is investigating the presence of drugs – a legitimate matter for investigation, to be sure, but not one with any reasonable connection to the class of infractions that result in a routine traffic stop. Thus, the use of such dogs necessarily extends the scope of a routine traffic stop into a different and unrelated area of law enforcement activity. The Fourth Amendment prohibits the police from crossing that line, absent independent probable cause, or at least individualized suspicion, depending on the nature and quality of the additional intrusion. If individuals were subject to such arbitrary governmental treatment every time they violated a traffic ordinance, the security guaranteed by the Fourth Amendment would disappear.

Nonetheless, the State seems to believe that a motorist's full enjoyment of her Fourth Amendment rights depends serendipitously upon her not falling subject to a valid traffic stop. In the State's view, a valid stop confers a kind of "wild

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[2]Of course, a more extensive investigation may also be conducted in connection with the effectuation of a custodial arrest. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973). It is clear, however, that the "search incident to arrest" exception applies only in cases in which an arrest is actually made, and not in cases in which such an arrest *could* have been made. *See Knowles v. Iowa*, 525 U.S. 113 (1998).

card" upon the police. Thus, while the police cannot lawfully stop a car for a random drug inspection, the State contends that the same drug inspection may go forward once the car has been stopped for an unrelated traffic law enforcement reason, such as a faulty tail-light or a child who has wriggled out of his seatbelt. The State's reasoning is contrary to the fundamental Fourth Amendment requirement that a search or seizure not exceed the scope of its rationale.

Of course, individualized circumstances may justify an expansion of the scope of a traffic stop. In *New York v. Belton*, 453 U.S. 454 (1981), for example, the scope of a routine traffic stop was properly expanded when the investigating officer smelled marijuana and noticed the presence of drug paraphernalia in plain view. *Id.* at 455. But the expansion of the scope of a traffic stop cannot be justified without such individualized circumstances. The Court emphasized that point in *Knowles v. Iowa*, 525 U.S. 113 (1998), where it rejected the contention that a police officer was entitled to do a full search of the car because he lawfully *could* have arrested the motorist, even though he had not actually done so. *Id.* at 114. In these circumstances, the Court held, a search was not permissible without independent justification, such as a reasonable belief that the motorist was armed. *Id.* at 118-119.[3]

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[3] Here, the decision of the Illinois Supreme Court properly may be understood as focusing on the question whether sufficient grounds existed to extend the investigation beyond the scope of the routine traffic offense that led to the stop. It was not error to liken the permissible scope of a seizure justified by a routine traffic stop to the standards that this Court first articulated in *Terry*. *See* Pet. App. 3a. Indeed, this Court stated in *Berkemer*, and reiterated in *Knowles*, that a simple traffic stop that results only in the issuance of a citation is akin in nature and scope to a *Terry* stop, and the correct Fourth Amendment analysis of such a stop therefore resembles that applicable to a *Terry* stop. *Berkemer*, 468 U.S. at 439; *Knowles*, 525 U.S. at 116-119. Thus, the State's insistence (Pet. Br. 13-17) that a routine traffic stop based on probable cause is categorically and invariably different from a *Terry* stop is wide of the mark. Clearly, what is constitutionally permissible in a traffic stop that does not result in a custodial arrest is different from what would be permissible in a traffic stop that does result in a custodial arrest. *See, e.g., United States v. Jackson*, 377 F.3d 715, 717 (7th Cir. 2004) (Easterbrook, J.) ("And as *Knowles* explained it is *custody*, and not a stop itself, that makes a full search reasonable: officers' needs to protect themselves and preserve evidence are what justify the rule allowing searches of arrested persons.") (emphasis in original). Thus, the type of analysis undertaken by the Illinois Supreme Court was plainly appropriate.

The scope requirement is essential to one of the fundamental purposes of the Fourth Amendment: protecting citizens against "police conduct which is overbearing or harassing," or which otherwise interferes with essential personal liberty and security. *Terry*, 392 U.S. at 15. As this Court observed long ago, the Fourth Amendment was designed to protect citizens from indiscriminate police actions. *Warden v. Hayden*, 387 U.S. 294, 301 (1967). "It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of the 'sanctity of a man's home and the privacies of life.'" *Id.*, *quoting Boyd v. United States*, 116 U.S. 616, 630 (1886).

Consistent with these principles, a routine traffic stop cannot be deemed a "free pass," whereby the scope requirement is set aside, and the police are automatically empowered to undertake whatever additional, unrelated and intrusive investigation they see fit, simply because a motorist has fallen subject to their dominion by driving a mile or two above the speed limit or by forgetting to replace the bulb in his tail-light. If, in a particular case, the scope of a routine traffic search is to be expanded beyond the reasons for which

the stop was initiated, that move must be supported by some independent showing of individualized suspicion. It cannot be automatic.

B. The Use of a Drug-Detection Dog During a Routine Traffic Stop Impermissibly Alters the Nature and Quality of the Stop.

The introduction of a drug-detection dog transforms a simple traffic stop into a public drug investigation, which is materially different, not simply in scope, but also in nature and quality, from the stop that was initially authorized by virtue of the motorist's traffic infraction. When the investigative focus shifts from broken tail-lights to possible drug offenses, and entails the use of drug-detention dogs, the nature and quality of the stop are fundamentally changed. To determine whether this additional intrusion satisfies constitutional requirements, "the nature and quality of the intrusion on the individual's Fourth Amendment interests [must be balanced] against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). *See Prouse*, 440 U.S. at 654; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

1. The Use of Drug-Detection Dogs During Routine Traffic Stops Subjects Motorists to Drug Screenings Conducted in a Random Manner.

The State argues (Pet. Br. 6-10) that a valid stop for any traffic violation vests the police with absolute discretion to investigate the car and all of its occupants for possible drug offenses, and that the deployment of a drug-detection dog requires no justification independent of the reason for the initial stop. Whether they exercise that discretion in a particular case, according to the State, is entirely up to the police, because they have the power to do so in all cases, automatically and as a matter of course.

As the facts of this case demonstrate, the State believes that police need no reasoned basis for choosing to investigate one stopped car rather than another. They may pick a car at random. They may pick a car based on its color. They may make the decision based on stereotypes concerning the motorists. The decision may be made by an officer at the scene, either before or after some preliminary investigation, or, as here, by a canine officer who knows nothing of the situation on the ground, but has time on his hands and hears on the radio that "a motorist has been stopped for speeding."[4] Notwithstanding the State's admittedly important interest in intercepting illegal drugs, it is difficult to see how that interest could justify such arbitrary law enforcement practices.

But it is not difficult to understand that becoming the subject of a public drug screening, with its attendant annoyance, notoriety, and embarrassment, is materially different for motorists than simply being stopped for speeding or driving with a noisy muffler, being given citations, and being sent on their way. Unlike a simple traffic stop, the addition of a drug investigation component may well entail the presence of multiple police officers and a second, specially marked "K-9 unit" police car, and, by definition, the presence of a drug-detection dog circling the

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[4] Here, of course, the officer with probable cause to stop the vehicle did not request the assistance of the canine unit. (Pet. App. 2a.) Nor, apparently, did anyone in the chain of command order the canine unit to the scene. The canine officer, who knew nothing more than the fact that a car had been stopped for speeding, decided to commence a drug investigation. (*Id.*) He simply advised the dispatcher that he was on the way. (*Id.*)

stopped vehicle. Passers-by – whether interstate travelers or the motorist's neighbors – are likely to view this amplified stop as "a crime scene," and assume that more is amiss than a broken tail-light. At all events, the deployment of a canine unit is an exceptional act that casts suspicion, and unmerited attention, on the vehicle and its occupants. To permit such harm to be visited on citizens by a street-level police officer acting arbitrarily, without any reasonable basis to suspect drug possession, is itself extraordinary. It is also contrary to the core meaning of the Fourth Amendment.

The specific impetus for any police investigation must always play a central role in defining its permissible scope. That principle applies with special force in circumstances where, as here, the relevant jurisprudence of this Court establishes that the police have no Fourth Amendment obligation to explain why they have chosen to stop one motorist violating traffic laws rather than another. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Whren v. United States*, 517 U.S. 806 (1996). The very absence of any requirement that the police explain their reasons for focusing on a particular individual makes it all the more important that the investigation be held to its proper scope and not be used as a reason for commencing some unrelated, intrusive investigation that the police might find interesting to pursue. Indeed, in these circumstances, a contrary rule would vest the state with unbounded discretion to initiate criminal investigations against anyone who exercises the privilege of driving, and does so in a less than perfect manner. That is not a reasonable interpretation of the Fourth Amendment.

As this Court has previously noted, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals

against arbitrary invasions." *Prouse*, 440 U.S. at 653-54. *See also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). To single out an individual for public investigation without individualized suspicion is the essence of such arbitrary action.

In *Prouse*, of course, the police were stopping cars on a random basis. *See Prouse*, 440 U.S. at 650-651. There, the arresting officer decided to stop the car simply because he "saw the car in the area and wasn't answering any complaints." *Id.* The police action here is different from *Prouse* (where the stop itself violated the Fourth Amendment), but it is no less arbitrary. In both cases, the police decided to take some action (the stop in *Prouse*, the post-stop drug investigation here) for no better reason than the fact that they *could*. Both actions were taken with no "legitimate basis upon which a patrolman could decide that [investigating] a particular driver . . . would be more productive than [investigating] any other driver." *Id.* at 661. In *Prouse*, the Court specifically noted the arbitrary nature of the police action in that case, and recognized that "sporadic and random stops of individual vehicles making their way through city traffic [are to be distinguished from] those stops occasioned by roadblocks where *all* vehicles are brought to a halt or to a near halt, and *all* are subjected to a show of the police power of the community." *Id.* at 657 (emphasis added).[5]

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[5] Among other things, the Court recognized that checkpoint investigations do not entail the same stigma or potential for fear and annoyance: "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id. See also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("[e]xcept at the border and its functional equivalents, officers on roving patrol may

But even the law relating to roadblocks is not sufficiently capacious to provide support for the State in this case. As the Court recognized in *Edmond*, even that body of case law cannot justify suspicionless investigations "designed primarily to serve the general interest in crime control." *Edmond*, 531 U.S. at 42. The Court noted:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in *Prouse* that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. . . . Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

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stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.)" In *Edmond*, the Chief Justice, who would have found no violation of the Fourth Amendment on the facts of that case, specifically emphasized the differences between "roving patrols" and the "regularized manner" in which checkpoint stops are conducted. 531 U.S. at 49-50 (Rehnquist, C. J., dissenting).

Edmond, 531 U.S. at 41-42 (citation omitted).[6] Similarly, the existence of a valid traffic stop cannot by itself serve to justify the commencement of a suspicionless, unrelated drug investigation. Without independent justification, the transformation of a traffic stop into a drug investigation, at the sole discretion of a street-level police officer acting on his own initiative, is precisely the kind of "standardless and unconstrained discretion" that this Court has previously condemned. *Edmond*, 531 U.S. at 39, *quoting Prouse*, 440 U.S. at 661.

In sum, the use of a drug-detection dog at a routine traffic stop, even where the stop itself is based on probable cause, impermissibly alters the nature and quality of the stop. Given the absence of any logical relationship between traffic violations and drug offenses, the transformation of a traffic stop into a drug investigation is simply arbitrary. Absent at least reasonable suspicion, such a drug investigation cannot withstand Fourth Amendment scrutiny.

2. The Presence of a Dangerous Dog Creates an Intimidating Environment for Motorists.

The introduction of a drug-detection dog into a routine traffic stop is not unobtrusive; nor is it akin to the use of an antiseptic, scientific instrument. The mere presence of a

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[6] As the Court pointed out, it has frequently approved checkpoint programs for such purposes as "policing the border or ... ensuring roadway safety." *Id.* at 41. Recognizing that the scope of a traffic stop may not be expanded to include a drug investigation, without individualized suspicion, is not in any way inconsistent with those precedents. Nor is there any reason to believe that insisting that traffic stops normally be held to their original scope would affect in any way the ability of law enforcement officials to mount checkpoint programs designed to preserve public safety by checking for drunk drivers or the presence of explosive devices. *Compare Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), *with Edmond*, 531 U.S. at 42.

drug-detection dog is intimidating. As one judge has noted, "drug dogs are not lap dogs." *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004) (McKay, J., dissenting). Drug detection dogs "typically are large, and to many ordinary innocent people, fearsome animals." *Id.* They may or may not be trained to attack on command, but many motorists will undoubtedly believe that they are, and will therefore be frightened by them. *See People v. Lynch*, 609 N.E.2d 889, 891 (Ill. App. Ct. 1993) (luggage was transported to DEA office for canine search because narcotics detection dog was trained to attack and could not be released near public).[7]

That the handlers of such animals are uniformed officers is not likely to assuage the fears of otherwise frightened motorists. Indeed, the United States Department of Justice has expressed concern about the number of suspects and arrestees who have been bitten by police dogs in recent years. For example, the Department noted that the deployment of

[7] Not surprisingly, several state courts have held that dogs may be classified as deadly weapons, depending on breed, training, and handler, for purposes of deadly force statutes. In *Commonwealth v. Tarrant*, 314 N.E.2d 448 (Mass. App. Ct. 1974), for example, the Massachusetts Appellate Court found that a particular German Shepherd was a dangerous weapon. The *Tarrant* court noted that "[i]t is common knowledge that dogs can be instructed to attack persons on command, thus being used as instruments of harm, and we take judicial notice of the fact that dogs so trained are frequently used in police units known as 'K-9 Corps.'" 314 N.E.2d at 451 (citation omitted). *See also People v. Kay*, 328 N.W.2d 424 (Mich. App. Ct. 1982) (German Shepherd was a dangerous weapon within meaning of statute proscribing assault with dangerous weapon); *State v. Bowers*, 721 P.2d 268 (Kan. 1986) (Doberman Pinschers were deadly weapons for purposes of criminal statute). More generally, the widespread fear of dogs is reflected in the practice of posting "Beware of Dog" signs by property owners, whether they have dogs or not.

canine units in one jurisdiction between 1996 and 1999 resulted in bites nearly 70% of the time – far above the 10% level the Department considers acceptable. *DOJ's Findings Letter re: Use of Force by the Washington Metropolitan Police Department*, available at http://www.usdoj.gov/crt/split/documents/dcfindings.htm (visited 09/14/04). The Department has identified inadequate handler training as the likely source of this unacceptable incidence of dog bites. *See id.*; *DOJ's Investigation of the Miami Police Department; Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department*, available at http://www.usdoj.gov/crt/split/Cincmoafinal.htm (visited 09/14/04).

Moreover, dogs have been used to frighten people throughout our history, and they have sometimes been used for that purpose by law enforcement officials. *See, e.g., State v. Storm*, 238 P.2d 1161, 1178-1181 (Mont. 1951) (discussing the use of dogs for tracking and intimidating slaves). In the 1960s, many people were exposed to photographs and films of police dogs being used to intimidate children and other civil rights protesters. *See, e.g.*, Taylor Branch, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65 77 (1998) ("Police dogs tore into the march lines and high-powered fire hoses knocked children along the pavement like tumbleweed. News photographs of the violence seized millions of distant eyes, shattering inner defenses."). Many who saw those photographs well remember those scenes, to say nothing of those who were present.

Finally, the intimidating demeanor of dogs has been recognized in a number of federal criminal cases in which citizens have been successfully prosecuted for using dogs to intimidate federal law enforcement officials. *See United States v. Hoff*, 22 F.3d 222 (9th Cir. 1994) (affirming district

court's affirmance of magistrate judge's finding that defendant at illegal campsite intimidated forest ranger by saying "go get 'em" three times to defendant's companion's growling dog): *United States v. Caruana*, 652 F.2d 220 (1st Cir. 1981) (affirming jury verdict where two Doberman Pinschers were released onto porch to intimidate FBI agents attempting to serve subpoena).

Among other things, these criminal prosecutions show that even professional law enforcement officials have recognized that large, ferocious dogs can be quite threatening. If threatening to law enforcement officials cloaked with the authority of the state and specifically trained to deal with dangerous situations, all the more so for an ordinary citizen, who faces the power of the state in the person of one or more officers on the scene, and, of course, the dog himself.

3. The Use of a Drug-Detection Dog During a Routine Traffic Stop Will Often Extend the Duration of the Seizure.

The use of a routine traffic stop to conduct a suspicionless drug investigation violates the Fourth Amendment by unreasonably altering the nature and quality of the stop. In addition, the duration of the stop often will be extended as well. Often, as here, a motorist will not be stopped by a canine unit. A traffic officer will make the stop, and a canine unit will then be requested, or, as in this case, will volunteer for duty. The unit may be close by, or it may be some distance away. In either event, it will take some amount of time for the canine unit to make its way to the investigation site.

In some cases, the time necessary for the arrival of the canine unit will not extend the time ordinarily necessary for the officer on the scene to perform the duties normally incident to a traffic stop. In other cases, of course, the

distance to be traveled will be greater than that, and the time necessary for the arrival of the canine unit may well exceed the amount of time ordinarily necessary to perform those tasks. In the latter case, a police officer will be sorely tempted to ask a few more questions, to take his time contacting the dispatcher with respect to a warrant search, and so forth. Once he is told that a canine unit is on the way, the officer on the scene will certainly do his best to avoid having to tell the canine officer (or his own supervisor) that there is no car available to investigate because the officer completed his processing of the traffic violation and was able to send the car on its way a moment or two before the canine officer's arrival at the scene. To expect otherwise is to ignore the realities of human nature. *See, e.g., People v. Luna*, 752 N.E.2d 477, 479 (Ill. App. Ct. 2001) (finding that officers improperly "stalled" to ensure that dog would arrive before traffic stop was completed); *People v. Koutsakis*, 649 N.E.2d 605, 608-09 (Ill. App. Ct. 1995) (same).

Of course, prolonging the duration of a traffic stop will violate the Fourth Amendment, even when the initial stop was supported by probable cause. *See, e.g., Florida v. Royer*, 460 U.S. 491, 500 (1983) (White, J.) (plurality opinion) ("This much ... is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); *Joshua v. DeWitt*, 341 F.3d 430 (6th Cir. 2003); *United States v. Santiago*, 310 F.3d 336 (5th Cir. 2002). But to say that police officers should not drag out their inquiries is to state a precept that will often prove unenforceable as a practical matter. In many cases, it will be difficult for a motorist, or for a court, to determine whether a police officer may have extended the duration of his legitimate traffic investigation in order to provide sufficient time for a colleague to arrive on the scene and begin a drug investigation. Moreover, the question normally will not even

be presented for decision unless drugs have been found and a drug prosecution ensues. Otherwise, the issue will be raised only in those instances when a motorist has been able to ascertain that the duration of the stop was unreasonably extended, and has the fortitude and the means to bring a civil rights action. Notwithstanding the State's view that the Court should adopt the principle that "anything goes," so long as there are reasonable grounds for a stop and it does not take "too long" (*see* Pet. Br. 15), an individual's Fourth Amendment interests cannot be measured purely in temporal terms.[8]

The only reasonable solution is to remove the incentive for the police officer to extend the necessary duration of the stop by restricting the scope of the stop to its actual purpose, and not permitting drug investigations to be appended serendipitously to valid traffic stops.

C. This Court's Prior Cases Do Not Support The Proposition That Probable Cause to Conduct a Traffic Stop Justifies an Intrusive, Unrelated Drug Investigation.

That Trooper Gillette had probable cause to stop respondent for speeding did not justify the commencement of a drug investigation. The State Amici (Ark. Br. 14-15) base

[8] Whether a stop is "too long" is not a question that the courts have answered with any degree of consistency. *See, e.g., Joshua v. DeWitt*, 341 F.3d at 445 (42-minute stop unreasonable); *United States v. Raynor*, 2004 U.S. App. LEXIS 18845, *8 (10th Cir. 2004) (47-minute stop reasonable); *United States v. Brigham*, 343 F.3d 490, 501 (5th Cir. 2003) (any unnecessary delay unreasonable) *People v. Cox*, 782 N.E.2d 275, 281 (Ill. App. Ct. 2002) (Illinois courts require reasonable suspicion to extend routine traffic stop beyond 15 minutes). Thus, reliance on duration as a dispositive factor would create great uncertainty for citizens, the police, and the courts.

their contrary contention on the assertion that the decisions in *Whren* and *Atwater* mandate a different rule where traffic stops are supported by probable cause. Neither case supports that assertion.

In *Whren*, this Court held only that the existence of probable cause to effectuate a traffic stop will preclude an inquiry into a police officer's actual motivation for making the stop, when evidence of other criminal activity is discovered in the ordinary course of investigating and administering the stop, so long as the stop itself was not "conducted in an extraordinary manner unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Similarly, the Court held in *Atwater* that the existence of probable cause to effectuate a custodial arrest for a traffic infraction will preclude an inquiry into a police officer's actual motivation for making the arrest, subject to the same individual privacy interests. *Atwater*, 532 U.S. at 354.

The State Amici's reliance on these cases is misplaced. Neither decision even deals with possible grounds for expanding a seizure beyond its original scope; nor does either case suggest any basis for asserting that the existence of probable cause to make a routine traffic stop necessarily vests the police with absolute discretion to expand the scope of the traffic stop into an intrusive, unrelated drug investigation, unfettered by otherwise applicable Fourth Amendment requirements. On the contrary, these decisions make clear that the existence of probable cause authorized Trooper Gillette (regardless of any subjective motivation he may have had) to undertake actions reasonably incident to the investigation of a traffic stop, including the making of a custodial arrest, so long as those actions did not constitute extraordinary or serious intrusions on individual privacy. The case law does not authorize the transformation of a traffic

investigation into a drug search, absent the existence of individualized suspicion to do so.

The Court's unanimous decision in *Knowles* illustrates the basic principle that the grounds supporting a particular seizure that was (or could have been) made cannot automatically be invoked to justify a search or seizure of differing scope. 525 U.S. at 117 (historical rationales for the "search incident to arrest" exceptions inapplicable to routine traffic stops.) In *Knowles*, the police officer could have conducted a full search of the motorist's car if he had effectuated a custodial arrest (which he was authorized by state law to do), but he chose to issue a citation instead. *Id.* at 114-15.[9] Having chosen to issue a citation, his search of the car could not be justified, the Court held, by the fact that he *could* have arrested the motorist. *Id.* at 116-17. What he could have done, but did not do, was simply immaterial. In reaching that conclusion, the Court reiterated its observation in *Berkemer* that a routine traffic stop "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." *Id.* at 117, *quoting Berkemer*, 468 U.S. at 439.

Had the officer in *Knowles* effectuated a formal arrest, the Fourth Amendment would have permitted a more extensive search. But absent an arrest, probable cause to effectuate a

[9] Under Illinois law, Trooper Gillette likewise could have effectuated a formal arrest. *See* 165 ILCS 5/16-102 (authorizing arrest for violation of any provision of Illinois motor vehicle code); *People v. O'Brien*, 591 N.E.2d 469, 472 (Ill. App. Ct. 1992) (recognizing probable cause to arrest for speeding). Of course, a police officer may also ask for consent to search an automobile even when he does not choose to make an arrest. *See Ohio v. Robinette*, 519 U.S. 33 (1996). Here, Trooper Gillette made that request before the arrival of the canine unit, but respondent declined to authorize the search. The power to arrest, together with the authority to request consent, equips the police with all of the authority they require to extend the scope of an investigation.

traffic stop conferred no special investigative authority. *Knowles* and *Terry* are cut from the same Fourth Amendment cloth: the police must have individualized grounds for conducting their investigative activities. *Whren* and *Atwater* stand for the corollary proposition that when the police have such reasonable grounds, the subjective motivations of individual police officers ordinarily do not warrant scrutiny in individual cases.

Here, it is *Knowles* that provides the relevant analytic framework.[10] Trooper Gillette made a judgment in the field and decided to give respondent a warning, not even a citation. That should have ended the matter, regardless of how good the grounds were for the initial stop or the warning. There were no grounds at all, much less individualized suspicion, to start a drug investigation. The Fourth Amendment simply does not countenance suspicionless drug investigations incidental to traffic stops.

II. The Use Of A Drug-Detection Dog In The Investigation Of An Individual Motorist Is A Fourth Amendment Search Requiring Independent Justification.

The issues in this case are properly resolved by viewing the use of a drug-detection dog as entirely unrelated to the grounds for the initial seizure, that is, respondent's having exceeded the speed limit by six miles per hour on an interstate highway, and unsupported by any additional justification for extending the scope of that initial seizure to include a drug investigation. (*See* pages 8-12, *supra*.) The

[10] In light of *Knowles*, the State's reliance on *Atwater* to describe the proper scope of a traffic stop supported by probable cause (Pet. Br. 15) is perplexing. In its brief, the State fails to mention *Knowles*, much less to offer any reason to distinguish its holding that the difference between an actual arrest and one that *might* have occurred is dispositive.

Court may also resolve the issues in this case by holding that the deployment of a drug-detection dog was itself a "search" in the circumstances of this case, and therefore required at least a showing of reasonable suspicion, in its own right.

This Court's decision in *Place* is not to the contrary. There, the Court found no Fourth Amendment "search" when the police at one international airport had reasonable grounds to believe that drugs were contained in luggage bound for another international airport and used drug-detection dogs to inspect it. The Court's determination was based on certain assumptions about the nature of search dogs. Specifically, the Court took for granted the notion that the dog in question was "a well-trained narcotics detection dog," and that such dogs can be relied upon to "alert" only to contraband items. *Place*, 462 U.S. at 707. In light of these assumptions, the Court held that "the canine sniff is *sui generis*" and should not be characterized as a Fourth Amendment "search." *Id.*[11]

In *Kyllo*, the Court considered a somewhat different type of investigatory device which also functioned by amplifying human senses. There, the Court held that the use of a thermal imaging device aimed at a private home did constitute a Fourth Amendment search. The Court emphasized that this device was capable of providing information about the occupants' lawful as well as unlawful activities. 533 U.S. at 37-38. The technology involved in *Kyllo* could provide a basis for determining whether powerful lamps were being used, possibly for the purpose of growing marijuana, but it

[11] In *Edmond*, the Court repeated *Place*'s characterization of the activities of drug-detection dogs in the context of a challenge to an automobile checkpoint. *Edmond*, 531 U.S. at 40. In *Edmond*, however, the Court found that the checkpoint itself was an unconstitutional seizure, which obviated any need for an extended consideration of the search issue. *See* pages 16-17, *supra*.

likewise could provide information about the occupants' bathing and sauna routines. *Id.* at 38. In determining that the use of this device did constitute a search, the Court returned to first principles. The Court's holding proceeded from the principle, first articulated by Justice Harlan in his concurring opinion in *Katz*, that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33, *citing Katz*, 389 U.S. at 361 (Harlan, J., concurring). Applying that principle to the canine sniff at issue in the materially different circumstances of this case leads to the conclusion that here, unlike *Place*, the deployment of a drug-detection dog did constitute a Fourth Amendment search.

To be sure, an automobile does not have the constitutional status of a dwelling place. *See United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right ... to retreat into his own home and there be free from unreasonable governmental intrusion"); *New York v. Class*, 475 U.S. 106, 114-15 (1986) ("While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police"). It is also the case, however, that a motorist has a far greater expectation of privacy with respect to the interior of her private automobile than a passenger *en route* between two international airports has in luggage which he proposes to take aboard an airplane. *Cf. Place*, 462 U.S. at

707 ("exposure of respondent's luggage, *which was located in a public place*, to a trained canine [] did not constitute a 'search' within the meaning of the Fourth Amendment") (emphasis added). An automobile is a place in which most people spend a good part of their lives, and with respect to which they have an enhanced expectation of privacy. It is also the case that that enhanced privacy expectation is one which society deems reasonable.

Everyone knows that airline passengers cannot reasonably expect to board an airplane without exposing their luggage to forms of inspection that are far more intrusive than a canine sniff. The vital national interest in the security of the air transport system would be crippled by the recognition of any other expectation. That is simply not the case with individual motorists. Surely, we have not reached the point where people cannot reasonably expect to have their cars secure from inspection by drug-detection dogs. In terms of societal norms regarding reasonable privacy expectations, the secured areas of personal automobiles are much closer to the homes involved in *Kyllo* than to the airports in *Place*. Thus, the use of dogs in this case was a Fourth Amendment search in its own right and required a legitimate police interest to disregard the normal requirement of a warrant, and at least individualized grounds to suspect unlawful activity.

The State's exceptionally narrow view with respect to what generally recognized expectations of privacy should be deemed reasonable and therefore protected by the Fourth Amendment portends far more extensive intrusions into personal realms. Evolving technology promises almost unlimited possibilities for transforming routine traffic stops into far-reaching, multi-purpose investigations. Already, the police have begun to use portable devices which permit the acquisition of fingerprints and palmprints from automobile occupants in a traffic stop. *See, e.g., Palm-Print Readers: Police Cars to Get New Equipment*, Columbus Dispatch at News 6B (Sept. 4, 2004). Other such devices will undoubtedly allow the police to acquire voice exemplars and other private information that may prove useful to them in the future. To be sure, the use of drug-detection dogs as a means of investigation does not represent the cutting edge of modern technology, but this case nonetheless provides both a harbinger of things to come and an opportunity to reiterate the principle articulated in *Kyllo*: That science and technology may increasingly provide government with the means to invade private realms in ever more subtle and genteel ways, but those private realms remain protected by the Fourth Amendment, and, no matter how subtle or genteel the means of invasion chosen by the government, unreasonable incursions into areas that society deems private cannot be permitted.

At all events, the *Place* Court's stated assumptions about the nature of "canine sniffs" simply have not been borne out by subsequent experience and research. Drug-detection dogs have proved to be less reliable and disciplined than the Court thought in *Place*, where it assumed that canine sniffs categorically "do[] not expose noncontraband items."' 462 U.S. at 707. In fact, research shows that the reliability of dogs varies widely based on several factors, including the degree of its underlying training and the skill and attitude of its handler. Another significant factor is the randomness of the inquiry, with false alerts being much more likely in cases in which individualized suspicion is absent. *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 420-25, 429-32 (1996). When full searches are conducted on predictably false alerts, dogs may well uncover facts that fall predictably within a citizen's legitimate expectation of privacy, and which are deserving of constitutional protection. Dogs have

also proven difficult to control and have sometimes engaged in unexpected intrusions into personal domains. *See, e.g., United States v. Winningham*, 140 F.3d 1328 (10th Cir. 1998) (officer's facilitation of canine's sniff of vehicle interior violates Fourth Amendment); *United States v. Stone*, 866 F.2d 359, 363 (10th Cir. 1989) (considering whether a drug-detection dog's unexpected leap into motorist's vehicle violates the Fourth Amendment).

Accordingly, the use of dogs by law enforcement officials may sometimes contravene societal norms of reasonable expectations of privacy. Regardless of their accuracy and reliability, therefore, the Court should hold that the use of dogs to amplify the human sensory capabilities of police in inspecting a motorist's private automobile is, in circumstances such as these, a "search" that requires an independent showing of individualized suspicion. To hold otherwise would be inconsistent with the fundamental principle which this Court traditionally has applied, and which should continue to be applied to emerging technologies, that is, the principle that the question whether an activity constitutes a "search" depends on the circumstances, and, ultimately, on whether the government has "violate[d] a subjective expectation of privacy that society recognizes as reasonable."

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

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ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari
To the Supreme Court of Illinois

BRIEF OF ARKANSAS AND 27 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog during a legitimate traffic stop.

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INTEREST OF THE AMICI CURIAE

The amici States have a specific and a general interest in the resolution of this case. Law enforcement officers in many of the amici States use drug-detection dogs during traffic stops as one method of combating the drug trade. If the ruling of the Illinois Supreme Court is not reversed, this valuable law enforcement tool will be severely curtailed. More generally, the amici States have an interest in ensuring that law enforcement officers are not unduly restricted in the actions they can take during valid traffic stops. The principles applied by the Illinois Supreme Court might make unlawful a host of commonplace law enforcement practices. It is critical to the amici that this Court correct the Illinois Supreme Court's misapplication of the Fourth Amendment.

STATEMENT OF THE CASE

On November 12, 1998, Trooper Daniel Gillette stopped respondent for speeding on Interstate 80 in Illinois. Gillette called the dispatcher at 5:06 p.m. to check respondent's license plates. Trooper Craig Graham of the Illinois State Police Drug Interdiction Team heard the call over the radio and advised that he was going to meet Gillette and conduct a canine sniff. Pet. App. 1a-2a, 13a, 22a.

Gillette approached respondent in his car, informed him that he was speeding, and asked for his license, vehicle registration, and proof of insurance. Gillette then told respondent to park his car further onto the shoulder of the road and to walk over to the squad car. Once respondent was sitting in the squad car with him, Gillette advised that he was going to issue a warning ticket. Pet. App. 2a, 13a.

Gillette called the radio dispatcher to check the validity of respondent's license and to see if he had any outstanding warrants. The dispatcher informed Gillette that respondent had surrendered a valid Illinois license to Nevada, but the validity of his Nevada license was not confirmed for another two minutes. Gillette then asked the dispatcher to obtain respondent's criminal history. As he awaited the results, he asked respondent if he had any prior arrests and whether he would grant consent to search his car. Respondent answered "no" to both questions. At 5:12 p.m., the dispatcher advised that respondent had two prior arrests for distribution of marijuana, whereupon Gillette began to write a warning ticket. Pet. App. 2a-3a, 14a.

While Gillette was writing the warning ticket, Trooper Graham arrived with the drug-detection dog. Gillette told Graham that he was writing a warning ticket and that Graham should walk the dog around respondent's car. Less than one minute later, Graham advised that the dog had alerted at the

trunk. Gillette then searched the trunk and found marijuana. At 5:15 p.m., Gillette changed the activity code of the stop to a narcotics detention. Gillette seized the marijuana and arrested respondent, who signed the warning ticket once he was at the police station. Pet. App. 3a, 14a, 22a.

Respondent was subsequently charged with cannabis trafficking in violation of 720 Ill. Comp. Stat. 550/5.1(a) (West 1998). Pet. App. 3a. The trial court denied his motion to suppress the drugs found in his trunk and convicted him after a bench trial. An Illinois Appellate Court affirmed. Pet. App. 20a. In a 4-3 decision, the Illinois Supreme Court reversed. The court applied the two-part test from *Terry v. Ohio*, 392 U.S. 1 (1968), to hold that police need reasonable suspicion of drug-related activity before using a drug-detection dog during a legitimate traffic stop. Pet. App. 4a-5a. The Court reasoned that the dog sniff of respondent's car was improper because "it impermissibly broadened the scope of the traffic stop in this case into a drug investigation." Pet. App. 5a.

SUMMARY OF ARGUMENT

1. Because *Terry* stops are based on reasonable suspicion, not probable cause, courts are required to examine "whether the officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. After undertaking such an

examination, the Illinois Supreme Court held that the use of a drug-detection dog during the stop of respondent violated the Fourth Amendment. However, Officer Gillette stopped respondent based upon probable cause that he violated the law. The Illinois Supreme Court thus applied the wrong analytic framework in addressing respondent's suppression motion. The *Terry* rules do not apply to stops founded upon probable cause.

In viewing the case as it did, the Illinois Supreme Court misread this Court's precedents, which have confirmed that *Terry* stops are analytically different from seizures based upon probable cause. *See, e.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984). Whereas courts examining *Terry* stops must balance competing governmental and individual interests, "with rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996). Simply put, an officer who possesses probable cause that a crime has been committed has the authority to take actions he would not necessarily have been entitled to take had he possessed only reasonable suspicion. This authority applies to routine traffic stops founded upon probable cause just as fully as it applies to other seizures. The validity of the canine sniff here must therefore be assessed based on an officer's authority to act when he has probable cause, not based on his narrower authority to act when he has reasonable suspicion.

2. This Court looks beyond probable cause to determine the reasonableness of a search or seizure only when it is executed in "an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Examples of such extraordinary actions are ones in which deadly force was used or in which the body was penetrated. By contrast, the use of a drug-detection dog is not an extraordinary measure that triggers further scrutiny of a traffic stop beyond the probable cause that justified the stop. A canine sniff, which simply uses a trained dog's sense of smell, is far closer in nature to a police officer's lawful observation of objects in plain view during the course of a traffic stop, which observation does not require additional justification beyond the probable cause for the stop.

Even if it were assumed that using a drug-detection dog converts a routine traffic stop into an "extraordinary seizure," the government's legitimate interest in detecting the substantial amount of illegal drugs that is carried on the nation's highways outweighs the motorist's interest in avoiding what is, at most, a minimal additional intrusion on his freedom. Finally, to the extent the Illinois Supreme Court crafted its no-canine-sniff rule based on a concern that the police will make traffic stops a pretext for investigating other offenses, its holding is directly contrary to *Whren*, 517 U.S. at 812-13, and *Ohio v. Robinette*, 519 U.S. 33 (1996), where this

Court rejected proposed prophylactic rules designed to limit pretextual stops.

ARGUMENT

The Fourth Amendment Does Not Require Reasonable Suspicion to Justify Using a Drug-Detection Dog to Sniff a Vehicle During a Legitimate Traffic Stop Founded Upon Probable Cause.

The Illinois Supreme Court held that police need reasonable suspicion before using a drug-detection dog during a legitimate traffic stop. Pet. App. 4a-5a. In reaching that conclusion, the court made two fundamental errors. First, the court "applied the two-part test adopted in *Terry v. Ohio* . . . to determine the overall reasonableness of the stop." Pet. App. 4a. Trooper Gillette's seizure of respondent, however, was based on probable cause. The rules governing *Terry* stops are therefore inapposite. Second, the court reasoned that the dog sniff—which does not constitute a Fourth Amendment search, *see Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), and which did not prolong the stop—was nevertheless improper because it "impermissibly broadened the scope of the traffic stop in this case into a drug investigation." Pet. App. 5a. But a Fourth Amendment non-event such as a dog sniff does not broaden the scope of a traffic stop. Just as a police officer may lawfully observe what is in his plain view during the course of a traffic stop (or a

Terry stop, for that matter), so too may he (or his canine assistant) use other senses to make observations during the course of a traffic stop.

A. The Illinois Supreme Court Erred in Applying the Rules Governing *Terry* Stops to a Traffic Stop Based on Probable Cause

1. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Thus, the touchstone of analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (*per curiam*) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Before *Terry v. Ohio*, the "term 'arrest' was synonymous with those seizures governed by the Fourth Amendment," and all arrests required probable cause to be reasonable. *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979). In *Terry*, the Court recognized that the government's interest in the prevention and detection of crime would not be properly served by requiring officers to have "the precise level of information necessary for probable cause to arrest" before briefly stopping a person to investigate or prevent a suspected crime. *Terry*, 392 U.S. at 22; *see also Adams v. Williams*, 407 U.S. 143, 145 (1972). Officers lacking probable cause needed the ability to adopt an

"intermediate response" short of arrest to "maintain the status quo momentarily while obtaining more information." *Adams*, 407 U.S. at 145-46.

The Court responded by approving the investigative stop, *see Brignoni-Ponce*, 422 U.S. at 881-82, a category of seizure "so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway*, 442 U.S. at 210. Balancing the government's important interest in the detection and prevention of crime against the minimal intrusion of a brief stop, the Court determined that investigative stops need only be justified by an officer's reasonable suspicion that crime is afoot. *See Brignoni-Ponce*, 422 U.S. at 881.

Because reasonable suspicion justifies a seizure only if the seizure remains a minimal intrusion when weighed against the government's interest, *see Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. ___, slip. op. at 9 (2004), the validity of an investigative detention also depends on "whether the officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (quoting *Terry*, 392 U.S. at 20). This requires examining the relationship between the officer's investigation and the reason for the stop and whether the duration and other conditions of the

detention are appropriate in light of the nature of the suspicion. *See United States v. Place*, 462 U.S. 696, 709-710 (1983) (90-minute detention of luggage for dog-sniff was unreasonable due to lack of diligent investigation); *Dunaway*, 442 U.S. at 216 (the degree of intrusiveness associated with custodial interrogation required probable cause).

2. The Illinois Supreme Court has held that *Terry* principles govern the conduct of police during "routine traffic stops," even those based (as here) on probable cause. Pet. App. 4a (citing *People v. Gonzalez*, 704 N.E.2d 375 (Ill. 1998)); *see also People v. Cox*, 782 N.E.2d 275, 278 (Ill. 2002). In *Gonzalez*, the court justified that approach by reference to three decisions of this Court, which the Illinois court characterized as equating *Terry* stops and traffic stops. 704 N.E.2d at 421-22 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Michigan v. Long*, 463 U.S. 1032, 1047-52 (1983); and *Mimms*, 434 U.S. at 111-12). The Illinois Supreme Court's reading of this Court's decisions is, however, flatly wrong. This Court has, quite properly, not equated those two types of police actions. Accordingly, the constitutional limits that are specific to *Terry* stops do not govern police conduct during traffic stops based on probable cause.

Berkemer is the most instructive of the three cases on the relationship between *Terry* stops and traffic stops founded upon probable cause. One of the issues before the Court in *Berkemer* was whether the police

must give *Miranda* warnings before questioning motorists detained during a routine traffic stop. In holding that such warnings are not required, the Court observed that the brevity of the typical traffic stop and the vulnerability felt by a stopped motorist make "the usual traffic stop . . . more analogous to a so-called *Terry* stop . . . than to a formal arrest." *Berkemer*, 468 U.S. at 439 (internal citation omitted). The Court was careful to add, though, that

> [n]o more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

Id. at 439 n.29. The Illinois Supreme Court plainly failed to heed that caution and read far more into the analogy than this Court intended.

The Illinois Supreme Court likewise misread *Michigan v. Long* and *Pennsylvania v. Mimms*. To be sure, in *Long* this Court applied *Terry* to determine the validity of the search of the passenger compartment of a vehicle. The Court did this for good reason—the officers did not stop the vehicle based on probable cause. Rather, the officers observed the vehicle swerve into a ditch, investigated, and then

subjected the driver to a *Terry* protective patdown and a protective search of the passenger compartment of the car. *Long*, 463 U.S. at 1035-36; *see also id.* at 1035 n.1 ("The court below treated this case as involving a protective search, and not a search justified by probable cause to arrest . . . .").

In *Mimms*, the Court addressed two questions: whether an officer may order a lawfully detained motorist to exit his vehicle, and whether the officer may then conduct a patdown of the motorist. 434 U.S. at 108-112. The Court answered the first question "yes" after concluding it is reasonable for an officer to order a detained motorist out of his vehicle. The Court cited *Terry* several times during the course of its discussion of Fourth Amendment reasonableness (*id.* at 109-111), but did not state that all traffic stops must be treated as *Terry* stops, let alone apply the *Terry* standard that an officer's action must be "reasonably related in scope to the circumstances which justified the interference in the first place." In answering the second question "yes," the Court stated that "the answer is controlled by *Terry v. Ohio*, *supra*." *Id.* at 111. Once again, however, that is a far cry from equating all traffic stops with *Terry* stops for Fourth Amendment purposes. *Terry* authorized officers to patdown detained individuals when appropriate; *Mimms* simply held that the patdown of Mr. Mimms was appropriate. To the extent *Mimms* left unclear the relationship between *Terry* stops and traffic stops based on probable cause, footnote 29 of

Berkemer confirmed that the two are analytically distinct.[1]

3. Even if this Court had been silent on the issue, as a matter of logic and principle it is plain that the *Terry* stop doctrine—requiring careful examination of "whether the officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place"—does not control the constitutionality of seizures supported by probable cause. *Terry*'s exception to the general rule requiring probable cause was predicated on the minimal intrusion of the investigatory stop as balanced against the government's interests. *See Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Limitations on the scope of the encounter were intended to ensure that this balancing of interests does not change from one weighing in favor of the seizure to one weighing against it. *See id.* "With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996).

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[1] This Court's recent decision in *Hiibel*, *supra*, is not to the contrary. *Hiibel* did not involve a traffic stop founded upon probable cause. Rather, a deputy sheriff responded to a telephone call reporting that a man was assaulting a woman in a truck. "When the officer arrived at the scene, he found the truck parked on the side of the road." Slip op. at 1. The ensuing encounter between the officer and the suspect constituted a *Terry* stop. *Id.* at 6-9.

The analysis does not change merely because, as the Court observed in *Berkemer* (468 U.S. at 439), a routine traffic stop has some features in common with *Terry* stops. Consistent with any other seizure supported by probable cause, a traffic stop meets the general rule of reasonableness without any additional balancing of the interests. *See Whren*, 517 U.S. at 818. Indeed, a finding of probable cause permits even a full-custodial arrest for minor traffic offenses, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)—an action an officer obviously could not take if he had only reasonable suspicion of wrongdoing. The validity of the canine sniff in this case must, therefore, be assessed based on an officer's authority to act when he has probable cause, not based on his narrower authority to act when he has reasonable suspicion.

B. An Officer's Use of a Drug-Detection Dog During a Lawful Traffic Stop Does Not Impermissibly Expand the Scope of the Stop.

A canine sniff of the outer surfaces of a vehicle by a trained narcotics detection dog does not constitute a search under the Fourth Amendment. *See Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. "An exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics," and

thus "is much less intrusive than a typical search." *Edmond*, 531 U.S. at 40 (quoting *Place*, 462 U.S. at 707). Moreover, where a drug-detection dog sniffs the vehicle before the business of the traffic stop is complete, as was the case here (Pet. App. 3a), there is no interference with personal freedom beyond what was necessary for the stop in the first place. A canine sniff is, therefore, a Fourth Amendment non-event. It is not a search and it does not prolong a seizure. The question in this case is whether the Fourth Amendment nonetheless prohibits police from utilizing drug-detection dogs during the course of a traffic stop founded upon probable cause that a non-drug-related offense was committed. It does not.

1. This Court looks beyond probable cause to determine the reasonableness of a seizure only when it is executed in "an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Examples of "extraordinary" searches and seizures are

> seizure by means of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), unannounced entry into a home, see *Wilson v. Arkansas*, 514 U. S. 927 (1995), entry into a home without a warrant, see *Welsh v. Wisconsin*, 466 U.S. 740 (1984), or physical penetration of the body, see *Winston v. Lee*, 470 U.S. 753 (1985).

Whren, 517 U.S. at 818; *see also Atwater*, 532 U.S. at 354 (applying "extraordinary manner" test to hold that arrest based on probable cause that traffic offense was committed was reasonable). The use of a drug-detection dog does not remotely compare with the above-listed actions such that it would trigger scrutiny of a traffic stop beyond the probable cause that justified it at its inception. As this Court noted in *Place* with respect to canine sniffs, "[w]e are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." 462 U.S. at 707.

Indeed, a canine sniff, which simply uses a trained dog's sense of smell, is far closer in nature to a police officer's observation (and subsequent seizure) of objects in plain view during the course of a traffic stop. In *Horton v. California*, 496 U.S. 128 (1990), the Court held that an officer may seize evidence of crime in plain view even if the discovery of the evidence was not inadvertent. The Court explained that observing and seizing an object in plain view does not "involve any invasion of privacy," *id.* at 133, and the seizure does not improperly invade the owner's possessory interests because "no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent." *Id.* at 140. The same is true when officers use drug-detection dogs in the course of lawful traffic stops. Like the intentional attempt to find evidence of wrongdoing under the

plain view doctrine, the intentional attempt to detect the scent of drugs (through the canine sniff) invades no constitutionally relevant privacy interests and it is not a "search" within the meaning of the Fourth Amendment. And like the intentional attempt to find evidence of wrongdoing under the plain view doctrine, "no additional Fourth Amendment interest is furthered" by preventing the seizure of illegal drugs once they are discovered during the course of a validly-initiated traffic stop.

2. Even if one assumed, *arguendo*, that the use of drug-detection dogs during a traffic stop made the stop an "extraordinary seizure" akin to seizure by means of deadly force or physical penetration of the body, the competing interests would weigh in favor of permitting the use of drug-detection dogs. On the government-interest side of the balance, a substantial amount of illegal drugs are trafficked in cars traveling on the nation's highways.[2] Moreover, detection of

[2] Beginning in the early 1980's the rate of seizures and arrests indicated that the nation's highways had become major arteries for drug transportation. Consequently, the Drug Enforcement Administration and state and local law enforcement established Operation Pipeline and Operation Convoy, which are highway drug-interdiction programs that target private passenger vehicles and commercial vehicles, respectively. *Testimony before the Subcommittee on the Western Hemisphere House Committee on International Relations* (March 3, 1999) (statement of Donnie Marshall, Deputy Administrator, Drug Enforcement Administration), *available at* http://www.usdoj.gov/dea/pubs/cngrtest/ct990303.htm (last visited on May 12, 2004). Between January 1986 and December 2001, Operation Pipeline and Operation Convoy led to seizures of $704 million in currency, 1,343,778 kilograms of marijuana, 942 kilograms of crack cocaine, 151,557 kilograms of cocaine, 539 kilograms of heroin, and 5,362 kilograms of methamphetamine. *Operations Pipeline and Convoy*, *available at* http://www.usdoj.gov/dea/programs/pipecon.htm (last visited on May 12, 2004).

drugs is increasingly difficult as traffickers get more sophisticated in their methods of concealing contraband.[3] As a result, drug-detection dogs are valuable tools for exposing illegal drug traffic. This Court has observed on several occasions the magnitude of the drug-trafficking problem and the need for flexibility in uncovering those who carry illegal drugs. *See United States v. Mendenhall*, 446 U.S. 544, 561-62 (1980) (noting that characteristics of drug trafficking pose "obstacles to detection of illegal conduct . . . unmatched in any other area of law

[3] Drugs are concealed by hiding them in remote areas of cars, such as gas tanks, *see United States v. Flores-Montano*, 541 U.S. ___, 124 S.Ct. 1582, 1584 (2004), radiators and transmission parts. *See* WLOX.com, *Drug Runners Favor Interstate Ten* (May 5, 2004) *at* http://www.wlox.com/global/story.asp?s=1843&ClientType=Printable (last visited on May 12, 2004). Smugglers have also begun dissolving cocaine in a liquid solution, soaking shirts and sweaters in it, drying them and then packing them in suitcases. Once they arrive at their destinations, they soak the clothing in water to draw out the drug and then let the solution evaporate back into powder form. *See* Donna Leinwand, *Smugglers Refine Tricks to Pass Stricter Security; Border Agents Confiscating Record Amount of Narcotics, but Stable Price on the Street Reflects Drug Rings' Success*, USA Today, April 11, 2002, *available at* 2002 WL 4723937.

enforcement"); *Royer*, 460 U.S. at 519 (Blackmun, J., dissenting) ("The special need for flexibility in uncovering illicit drug couriers is hardly debatable.").

On the individual's side of the balance, respondent was not detained any longer by Trooper Gillette as a consequence of the canine sniff. As a more general matter, any additional time devoted to these investigations will be a minimal intrusion on the motorist's freedom, as most can be done expeditiously. *See Royer*, 460 U.S. at 505 (suggesting that conducting canine sniffs is an expeditious method of detecting drugs). For example, the drug-detection dog alerted on the trunk of respondent's car in less than a minute, and the time from the initial stop to his arrest was approximately nine minutes. Pet. App. 3a, 22a. Moreover, a canine sniff is restricted to the outer surfaces of the vehicle and "discloses *only* the presence or absence of narcotics," *Place*, 462 U.S. at 707 (emphasis added), thereby limiting any intrusion upon the suspect's privacy. Although a motorist may experience minor inconvenience and embarrassment, that interest does not outweigh law enforcement's legitimate interest in detecting increasingly well-hidden illegal drugs. *Cf. Mimms*, 434 U.S. at 111 (ordering motorist out of his car is at most a mere inconvenience that cannot outweigh the interest in officer safety); *Hiibel*, slip op. at 9 (requiring a suspect to identify himself during a *Terry* stop is reasonable because, *inter alia*, it does not change the duration or location of the stop).

Accordingly, the use of drug-detection dogs, even if subject to Fourth Amendment balancing, does not transform a traffic stop supported by probable cause into an unreasonable seizure.

3. In *People v. Cox*, the Illinois Supreme Court suggested that its no-canine-sniff rule is premised on the concern that the police will use traffic stops as a pretext for investigating other offenses. *See* 782 N.E.2d at 280 ("An officer's authority to investigate a traffic violation may not become a subterfuge in order to obtain other evidence merely based on the officer's suspicion") (quoting *People v. Koutsakis*, 649 N.E.2d 605, 609 (Ill. App. Ct. 1995)). Other courts that adopted the no-sniff rule have expressed similar concerns. *See, e.g., State v. Weigand*, 645 N.W.2d 125, 136 (Minn. 2002) ("the officer appeared to have used the opportunity of a routine equipment violation, along with the availability of other officers to write a warning ticket, to conduct the dog sniff"). To the extent the Illinois Supreme Court crafted its no-canine-sniff rule based on that concern, its holding is directly contrary to *Whren*.

In *Whren*, the Court reaffirmed that an officer's subjective motivation plays no role in the determination of the reasonableness of a traffic stop supported by probable cause. 517 U.S. at 812-13. Citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983), *Scott v. United States*, 436 U.S.

128, 138 (1978). *United States v. Robinson*, 414 U.S. 218 (1973), and *Gustafson v. Florida*, 414 U.S. 260, 266 (1973), the Court stated that "these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 813. The Court further held—of particular relevance here—that those cases foreclose the adoption of purportedly "objective" rules that are "designed to combat nothing other than the perceived 'danger' of the pretextual stop, albeit only indirectly and over the run of cases." *Id.* at 814.

A year later, the Court once again rejected a proposed prophylactic rule designed to limit pretextual traffic stops by the police. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Court rejected a *per se* rule, adopted by the Ohio Supreme Court, that required police officers to inform motorists stopped for traffic offenses that they were free to go before they could attempt to engage in a consensual interrogation. Although the Ohio Supreme Court adopted the rule out of concern that police officers were using consensual searches "to turn a routine traffic stop into a fishing expedition for unrelated criminal activity," *Robinette*, 519 U.S. at 41 (Ginsburg, J., concurring) (quoting 653 N.E.2d 695, 699 (1995)), this Court found the rule flatly inconsistent with its Fourth Amendment jurisprudence. The same holds true for the inflexible rule adopted by the Illinois Supreme Court that would bar police officers from using drug-

sniffing dogs during traffic stops based on probable cause.

CONCLUSION

For the foregoing reasons, the decision below should be reversed

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Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Illinois Association of Chiefs of Police ("IACP") is a voluntary professional organization comprised of over 800 members from jurisdictions across Illinois. Those jurisdictions include law enforcement executives from large urban centers employing thousands of police officers, to small, rural municipalities with only a few officers. Most IACP members are active members of law enforcement, many of whom maintain canine programs within their jurisdictions and employ canine assists to enhance investigatory and enforcement activities within legal parameters. In addition, IACP members include legal advisors who counsel law enforcement officers and administrators on such issues, including the formulation of policy on the subject. IACP members are committed to the best interests of their respective communities and the law enforcement profession.

The Major Cities Chiefs Association ("MCC") is a professional organization of police executives representing the 59 largest cities or jurisdictions in the United States and Canada. Representation in the United States exceeds 200,000 law enforcement personnel serving a population in excess of 47 million. The MCC provides a forum for urban police chiefs, sheriffs, and other law enforcement chief executives to discuss common problems, share information and problem-solving strategies, and articulate the public safety needs of large cities in the formulation of criminal justice policy. The MCC is dedicated to the advancement of research, legislation, policy and programs that ensure the safety of our citizens and the officers that protect them.

Because of the direct relationship between IACP and MCC members and the daily activities of law enforcement across the United States, amici have firsthand knowledge of the practical impact of the Illinois Supreme Court's ruling in this case, and are therefore in a unique position to

impart their knowledge to this Court. The IACP and the MCC believe that their views will aid this Court in the resolution of the issues presented in this case.[1] The IACP and the MCC submit this brief in support of Petitioner and with the consent of the parties. Letters of consent have been filed with the clerk of the Court.

SUMMARY OF ARGUMENT

The Illinois Supreme Court's opinion undercuts a valuable tool in the war on drugs through a misunderstanding of the permissible scope of police activity during a traffic stop and a misapplication of *Terry v. Ohio*, 392 U.S. 1 (1968). The decision further undercuts this Court's determinations that canine sniffs during traffic stops do not implicate the Fourth Amendment because they do not constitute searches requiring probable cause or articulable suspicion. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983). Moreover, the lower court's opinion contravenes *Whren v. United States*, 517 U.S. 806 (1996), which permits officers to use traffic violations as a means of investigating possible illegal drug activity.

In the instant case, the canine sniff was conducted during a vehicle stop which was supported by probable cause. The canine sniff did not prolong the duration of the stop. On the contrary, the canine sniff of the exterior of the vehicle was completed in less than a minute and prior to the completion of the warning citation for the initial stop. The use of the canine to conduct the sniff of the vehicle was simply an

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the IACP or the MCC, their supporters, and their counsel, made a monetary contribution to the preparation and submission of this brief.

additional investigative process applied to a vehicle properly stopped for a traffic violation.

There is no sound basis for the view that police who have probable cause to make a traffic stop are precluded by the Fourth Amendment from utilizing the range of investigative aids at their disposal where those practices do not constitute a search or otherwise extend the period of detention. In addition to its impact on the war on drugs, such a construction of the Fourth Amendment threatens to undermine the government's war on terror, which relies on canines to sniff vehicles and luggage for narcotics and explosives at large gatherings or at transportation centers such as our nation's airports.

ARGUMENT

I. THE ILLINOIS SUPREME COURT'S DECISION IMPERMISSIBLY GRAFTS A RIGHT TO BE FREE FROM CRIMINAL INVESTIGATION ONTO THE FOURTH AMENDMENT

The Illinois Supreme Court's announcement of a Fourth Amendment right to be free from canine sniffs during vehicle stops without even acknowledging the existence of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983), is striking evidence of the opinion's unsoundness. Though this Court held in *Place* and *Edmond* that canine sniffs on luggage and vehicles do not constitute searches triggering Fourth Amendment protections, the lower court erroneously relied on *Terry v. Ohio*, 392 U.S. 1 (1968), which had nothing to do with either canine sniffs or the application of general investigative procedures, for the proposition that police must possess reasonable suspicion of criminal activity before they may conduct any kind of criminal investigation, including a canine sniff, during a traffic stop.

The Illinois Supreme Court's application of a reasonable suspicion standard to canine sniffs conducted during traffic stops impermissibly grafts an unprecedented right to be free from criminal investigation onto the Fourth Amendment. This significant limitation on law enforcement crime fighting tools is unjustified because the use of such dogs under the circumstances of the instant case did not constitute a search, did not prolong the stop, and did not, therefore, implicate the Fourth Amendment.

Police narcotics detection dogs are a valuable law enforcement tool in connection with the effort to stem the tide of illegal narcotics flowing into and within our nation through its airports, borders, interstate highways, and city streets. Although complete statistics on the use and effectiveness of canines by law enforcement are not readily available, in the opinion of the amici, canine sniffs such as that used in the instant case are critical to effective law enforcement.

In the experience of our members there have been countless occasions where dangerous contraband has been discovered though the use of canines. In some instances, such as those involving trucks and other large vehicles, discovery of contraband is almost impossible without the use of canines. Our members understand that use of canines to detect narcotics in these circumstances has resulted in some of the largest seizures of narcotics. The Illinois Supreme Court decision would dramatically limit the ability of law enforcement to employ canines, unnecessarily impairing narcotics enforcement efforts.

While there is a lack of comprehensive data on the use of canines at the local level in the recovery of narcotics, the experiences of the Illinois State Police and the federal government in using canines illustrates their value as investigative tools. Our membership advises that local jurisdictions rely on the Illinois State police to patrol interstate highways that are often conduits for narcotics

directed toward local communities. The State Police have had great success in utilizing canine assets to perform this important mission. Canine units employed by the Illinois State Police over the last five years have been involved in more than 6,500 felony arrests. During that same time period (1999 to 2003) over 42 short tons of cannabis and 1.2 short tons of cocaine have been seized. The street value of these narcotics is estimated to exceed four hundred fifteen million dollars ($415, 000,000.00).

The federal government's use of canines in combating crime is also well established. For example, the federal customs service has utilized canines for over 30 years with remarkable success. As the United States Customs and Border Protection website indicates, the use of canines has resulted in over 130,000 drug and narcotics seizures. This represents the confiscation of narcotics with an estimated street value of several billions of dollars. *See* U.S. Department of Homeland Security, U.S. Customs and Border Protection, Canine Enforcement Program, Website http://www.cbp.gov/xp/cgov/enforcement/canines/canine_program/canine.xml (June 21, 2004). Moreover, our members have observed that with the increasing sophistication of criminals in concealing narcotics in traps installed in passenger vehicles, the use of canines to detect drug contraband is growing even more important.

While canines are a highly effective investigative tool in alerting law enforcement to the presence of narcotics and dangerous contraband, they are employed with minimal intrusion on the privacy rights of individuals. When properly trained, their heightened sense of smell allows dogs to detect specified narcotics without entering or rummaging through the vehicle. As a result, none of the contents are disturbed or otherwise revealed. Unless the dog alerts on the vehicle, the government never obtains any information about the owner's property or the contents of the vehicle. In our experience canine sniffs of vehicles are

accomplished in minutes or seconds. The inconvenience to the vehicle occupants is minimal.

Conceptually, walking a dog around a vehicle is precisely analogous to an officer walking around the car and making observations, with the key exception that a canine's heightened sense of smell allows it to pick up the scent of narcotics inside a trunk where a human being could not. No one would seriously dispute that an officer who smells marijuana coming from a vehicle while talking to a driver during a traffic stop possesses probable cause to take further action. The walking of a canine around the car does not invade the driver's privacy any more than does a police officer walking around the car. The mere fact that a canine's observations are more effective than a human's because of its heightened sense of smell should have no Fourth Amendment consequences.

Given the *de minimus* nature of any privacy intrusion, the lower court's reliance on *Terry* for the proposition that reasonable suspicion must accompany canine sniffs was unsound. If, as this Court held in *Place* and *Edmond*, a canine sniff is not a search, then neither *Terry* nor any of the Court's other precedents supports the application of any standard of suspicion to the government's use of the canine. Indeed, *Terry*'s application of a reasonable suspicion standard to frisks for weapons acknowledged that a frisk is a search, though not as intrusive as other searches for which the Court has always required probable cause. Here, the use of a canine is not a search, and therefore, the Fourth Amendment is not implicated.

While *Terry* requires investigative detentions, which are seizures, and weapons frisks, which are searches, to be premised on reasonable suspicion, neither *Terry* nor any of the Court's subsequent cases support the notion that every police action which does not qualify as a search or seizure during a traffic stop must be independently examined for

reasonableness. To the contrary, *Terry* only contemplates that conduct which extends the length or alters the character of the stop (i.e., the use of handcuffs) be analyzed to determine whether the stop, at some point, ripened into an arrest requiring probable cause. In this case, however, there is no contention that walking the canine around the car in any way prolonged the stop or constituted an arrest. Thus, by subjecting this simple investigative tool to a reasonable suspicion standard, the Illinois Supreme Court has impermissibly grafted a general right not to be investigated onto the Fourth Amendment.

II. THE LOWER COURT'S OPINION GUTS DRUG INTERDICTION PROGRAMS WITHOUT JUSTIFICATION AND CONTRAVENES *WHREN v. UNITED STATES*

The Illinois Supreme Court's rejection of canine sniffs during traffic stops contravenes this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), which upheld the viability of pretextual traffic stops under the Fourth Amendment. The *Whren* Court explained that, so long as an officer possesses reasonable suspicion of a traffic violation, he may stop a vehicle even if his true purpose is to investigate whether the driver is involved in illegal drug activity. Of course, any such stops remain subject to constitutional scrutiny under the equal protection clauses if police exercise their discretion to stop vehicles on the basis of race or other class based animus. *Id.*; *see also United States v. Armstrong*, 517 U.S. 456 (1996).

In reliance on *Whren*, many police agencies, including the Illinois State Police (ISP), have implemented drug interdiction programs, which actively utilize traffic stops to develop reasonable suspicion of illegal drug activity, and thereby combat the use of interstate highways for illegal narcotics trafficking. *See Chavez v. Illinois State Police*, 251

F.3d 612 (7th Cir. 2001) (rejecting racial profiling challenge to ISP's "Operation Valkyrie" drug interdiction program). These programs use a variety of tools to develop reasonable suspicion and probable cause of drug activity. The ISP's drug interdiction program trains officers to use both observation and conversation in an effort to determine whether a driver is transporting illegal narcotics. *Id.* at 621-22. An officer is trained to look for a myriad of potential indicators, including citizen band radios, tinted windows, radar detectors, perfume, duct tape, pagers, missing dashboard screws, missing handles and door knobs, and zippered bags.[2] While the presence of such indicators, either individually or in combination, may well be entirely innocent, they may also be indicators of illegal drug activity.

Officers are further trained to engage the occupants of the vehicle in consensual small talk, focusing on the purpose of the trip, points of origin and destination, and length of stay, as well as any explanations for the vehicle owner's absence, and information about where and when a vehicle was leased. Officers are advised to look for a subject's refusal or reluctance to answer, answering a question with his own question, unusual voice inflections or cracking, sighing, throat clearing, or yawning. Other potential indicators include the use of words and phrases such as "honestly", "truthfully", "I swear", etc. Officers are further trained to look for signs of stress including blushing,

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[2] Other potential indicators are religious paraphernalia (sometimes used to divert suspicion), inability to roll windows all the way down (suggesting doors may contain contraband), high odometer mileage, especially in late model vehicles, switches and buttons (may activate electronic compartments), large sums of cash, attorney cards, drug paraphernalia, hiding places, weapons, one key rings, maps showing drug source cities, rented vehicles, cashier's checks, and bondo on the vehicle.

turning pale, shaking, avoiding eye contact, repeated touching of the face, grooming, sweating, fidgeting, and nervous gestures. Again, such answers and idiosyncracies might well be innocent, or they might be indicative of a fear of being caught with illegal contraband.

A vital tool that an officer possesses to distinguish between innocent reactions and criminally culpable behavior is the trained narcotics detection dog. While an officer is writing a ticket or issuing a warning for the traffic violation, he may ask that a drug detection dog be brought to the scene to walk around the vehicle to determine whether the smell of designated illegal contraband is escaping the vehicle. If the dog fails to alert during its brief walk around the car,[3] the driver is sent on his way without the officer ever having learned anything further about the contents of the vehicle. Only when the officer's suspicions are confirmed through an alert does the investigation continue.

The Illinois Supreme Court's application of *Terry's* scope requirement to each and every aspect of an officer's conduct during a traffic stop effectively dismantles drug interdiction programs and dismisses *Whren* without justification. Though *Whren* unanimously upheld pretextual stops against Fourth Amendment challenge, the Illinois Supreme Court has inconsistently concluded that the driver of a vehicle properly stopped for a traffic violation cannot then be investigated for possible drug activity. Under the lower court's approach, every question an officer asks during the stop must be independently analyzed for a determination of whether it was reasonably related to the underlying

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[3] In this case, the dog alerted to the drugs in the vehicle in less than one minute.

purpose of the stop.[4] Thus, most of the questions that officers rely upon to determine whether a driver might be transporting drugs would, under the lower court's view, violate the Fourth Amendment, and require the suppression of any evidence seized as a result of information developed from the driver's answers or reactions to those questions. Similarly, under the lower court's view, a police officer would violate the Fourth Amendment simply by asking a driver for consent to search the vehicle[5], since such a question will ordinarily be unrelated to the purposes of a stop for speeding or some other violation of a vehicle code.

In the instant case, the lower court dismissed the officer's observations of an air freshener and atlas, the driver's nervousness, his choice of business attire for a cross country trip, and the absence of personal belongings in the car despite the driver's statement that he was moving to Chicago. The downplaying of these observations aptly illustrates the damage to drug interdiction programs

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[4] Indeed, the Illinois Supreme Court held, in *People v. Bunch*, 207 Ill.2d 7, 796 N.E.2d 1024 (2003), *cert. denied*,___U.S. ___ , 124 S. Ct. 1712 (2004), that every question asked of a passenger during a traffic stop, including "what's your name" and "Where you (sic) coming from", is subject to Fourth Amendment scrutiny under *Terry*'s scope requirement. Subsequently, on the same day the instant case was decided, the Illinois Supreme Court held that a police officer violated *Terry*'s scope requirement simply by checking a passenger's identification card for outstanding warrants. *People v. Harris*, 207 Ill.2d 515, 802 N.E.2d 219 (2003), *petition for cert. filed*, (U.S. Feb. 18, 2004) (No. 03-1224). Just last week, this Court undermined both of those decisions in upholding a Nevada law that criminalized a suspect's refusal to tell a police officer one's name. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, ___S. Ct.___, 2004 WL 1373207 (June 21, 2004).

[5] Drug Interdiction officers are also trained to request consent in connection with traffic stop based investigations of drug trafficking.

attendant to the lower court's decision. Indeed, the lower court was correct that the observations identified by the officer could just as well be innocent as culpable, though they were confirmed in this case when the dog alerted to a large quantity of illegal narcotics. Nonetheless, the possibility that an officer might be misinterpreting wholly innocent behavior argues in favor of, rather than against, the use of canine sniffs as a means of confirming or dispelling suspicions without any significant intrusion on privacy interests.

Contrary to the implication in the lower court's analysis, the Fourth Amendment was never intended to level the playing field between law enforcement and criminals. It was not intended to give criminals a fair chance to avoid detection if they are careful to conceal their contraband. To the contrary, the Fourth Amendment was only intended to protect the government from invading individuals' reasonable expectations of privacy in their zeal to fight crime. Thus, if the government is able to develop effective tools such as highly trained canines for detecting criminal behavior without unreasonably detaining or searching its citizens, then the Fourth Amendment affords criminals no relief.

Canine sniffs enjoy great success because some criminals do not bank on the fact that contraband within their vehicles emits odors which can be detected by a dog simply walking around the car. On the other hand, many more knowledgeable potential drug traffickers presumably choose not to transport drugs through our nations' highways and streets because of fear of detection by canines. The lower court's view that *Terry* prohibits canine sniffs, all investigative questioning, and computer checks on passenger identification, unless an articulable suspicion of criminality exists, sends a message to drug dealers that so long as they are careful to conceal their contraband and not affirmatively tip off the police, their drugs will be safe from detection, even when they are lawfully detained by law

enforcement for traffic violations. It is anomalous to permit law enforcement to employ pretextual stops for the purpose of investigating drug activity, as in *Whren*, and then rely on *Terry* to deprive them of the right to conduct any investigation once the vehicle is stopped.

Finally, any suggestion that sanctioning the use of canines during traffic stops will contribute to the creation of a police state in which citizens are routinely subjected to dog sniffs would be unavailing. As this Court recently noted in the context of informational checkpoints, such a concern is overblown given that police manpower and resources are limited. *Illinois v. Lidster*, ___ U.S. ___, 124 S. Ct. 885 (2004). In the present context, our members advise that those same limitations prevent law enforcement from training enough qualified handlers and dogs to allow a substantial proliferation of the use of canines. Indeed, we are advised that only a very small percentage of canine applicants are even accepted into the rigorous canine training programs.

Moreover, the use of canines during traffic stops can still violate the Fourth Amendment if they unnecessarily prolong the detention. That significant limitation makes it feasible for police to use a canine on a traffic stop only when a canine is already present in reasonable proximity to the scene of a particular stop. As a result, there is little reason to fear that dogs will soon be prowling our nation's highways sniffing every stopped vehicle.

III. NARROW LIMITS ON CANINE SNIFFS ADVERSELY IMPACT OTHER IMPORTANT LAW ENFORCEMENT INTERESTS

Amici believe that other weighty law enforcement interests are also threatened by the Illinois Supreme Court's limitation on the use of canine sniffs in the absence

of articulable suspicion of criminality. Specifically, our members advise that in the arena of homeland security, canine sniffs for explosives are an important anti-terrorism tool established at the direction of the federal government. Canines have had a longstanding role in the area of transportation security. They are able to scan vehicles and luggage for explosives or narcotics in a fraction of the time and with far less intrusiveness than humans rummaging through belongings and using man-made scanning technologies. The federal government is also exploring the use of canines to detect explosives in air cargo. Moreover, the mere public presence of canines at transportation centers serves to enhance public confidence in the safety of the transportation system as well as deter against terrorist threat.

As threats from large improvised explosive devices placed in vehicles increase, the use of canines to conduct assessments of stopped vehicles will continue to grow. Our members indicate that canines are routinely used in parking facilities and roadways adjoining airport facilities to look for explosives.

The federal government clearly recognizes the important role canines can play in ensuring the safety of transportation centers like airports. The United States Department of Homeland Securities, Transportation Security Administration is currently funding local law enforcement to increase canine teams to be used at airports. In addition to use in terminals these canines are also used by local law enforcement during heightened security alerts to search parking areas and approaching vehicles on roadways. The continued viability of such important practices are threatened by the Illinois Supreme Court's interpretation of the Fourth Amendment.

In all respects the use of canines at transportation hubs are minimally intrusive while serving compelling public interests. They are of short duration and limited

intrusiveness-designed only to detect explosives or narcotics. They do not expose any of a citizen's belongings to scrutiny or rummaging so long as the dog does not alert on contraband contained within. The dogs at transportation hubs are highly visible and thus serve an important deterrent effect. Though this Court's decision in *Place* would seem to sanction such programs, the lower court's decision in this case renders them uncertain in Illinois.

CONCLUSION

For the reasons discussed herein and in the brief of Petitioner, amici respectfully request that this Honorable Court reverse the decision of the Illinois Supreme Court, and hold that on the basis of its precedent and sound judicial policy, the canine sniff in this case did not violate the Constitution.

Respectfully submitted,

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No. 03-923

IN THE

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving the Fourth Amendment. See *Bond* v. *United States*, 529 U.S. 334 (2000); *Kyllo* v. *United States*, 533 U.S. 27 (2001); *Thornton* v. *United States*, 124 S. Ct. 2127 (2004).

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois correctly held that the Fourth Amendment requires that law enforcement officers have reasonable suspicion that a vehicle contains contraband before using a drug-detection dog to sniff the vehicle during a routine traffic stop. This is true for four reasons. *First*,

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

suspicionless dog sniffs are not reasonably related in scope to the circumstances that justified the initial stop, when the right of motorists to remain free from arbitrary police interference is balanced against the public interests advanced by the seizure. Such suspicionless sniffs prolong the length and increase the intrusiveness of seizures, without contributing substantially to the interdiction of contraband. In addition, suspicionless sniffs allow unfettered police discretion and present the risk of involuntary consents. *Second*, requiring reasonable suspicion will reduce the incidence of false positives, a significant problem with drug-detection dogs that results in intrusions upon motorists' Fourth Amendment rights. *Third*, requiring reasonable suspicion is consistent with this Court's precedents. *Fourth*, petitioner and its *amici* are wrong in arguing that suspicionless dog sniffs are justified where police have probable cause to make the traffic stop.

ARGUMENT

CONDUCTING A SUSPICIONLESS DOG-SNIFF IMPERMISSIBLY EXPANDS A ROUTINE TRAFFIC STOP INTO A NARCOTICS INVESTIGATION IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment ensures "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. A motorist is "seized" within the meaning of the Fourth Amendment during a routine traffic stop. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Whren* v. *United States*, 517 U.S. 806, 809-10 (1996). To be reasonable, such a seizure must be "'justified at its inception.'" *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968)). A traffic stop is not justified unless the police have an objectively valid suspicion that a violation has occurred. *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979). Suspicionless

stops of motorists are forbidden. *Id.*; *Brignoni-Ponce*, 422 U.S. at 884.

In this case it is undisputed that the initial decision to pull over respondent was justified. Nevertheless, a traffic stop that is initially justified must remain "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Sharpe*, 470 U.S. at 682 (quoting *Terry*, 392 U.S. at 20). Reasonableness requires balancing the motorist's right to remain free from arbitrary police interference against the public interests advanced by the seizure. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam); *Brignoni-Ponce*, 422 U.S. at 878.

In striking the proper balance, it is important to recognize that Fourth Amendment liberties "belong in the catalog of indispensable freedoms," for "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). At the same time, the public interest always weighs against this freedom because the exigencies of law enforcement "stand in constant tension with the [rights protected by the Fourth Amendment.]" *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973). The resultant tension counsels "a resolute loyalty to constitutional safeguards." *Id.*

Loyalty to the safeguards of the Fourth Amendment demands the result reached below. Suspicionless dog-sniffs are arbitrary exercises of police authority, which are anathema to a free society. The Illinois Supreme Court recognized as much, and demanded that there be "specific and articulable facts" giving rise to reasonable suspicion before the police conduct a dog-sniff during a routine traffic stop. *People* v. *Caballes*, 802 N.E.2d 202, 204-05 (Ill. 2003) (internal quotation marks omitted) (quoting *People* v. *Cox*, 782 N.E.2d 275, 281 (Ill. 2002)). This decision was correct and should be affirmed by this Court.

Make no doubt about it: What law enforcement seeks in this case is an absolute and unfettered right to conduct drug dog sniffs whenever and wherever, solely at the whim of the officer in the field, with the resulting ignominy of mostly innocent motorists being targeted like common drug couriers. See *Brown* v. *Texas*, 443 U.S. 47 (1979):

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, *supra*, at 663. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

Id. at 51. By this standard, the decision of the Supreme Court of Illinois must be affirmed.

A. Suspicionless Dog-Sniffs At Traffic Stops Would Work A Severe Intrusion Upon The Fourth Amendment Freedoms Of Millions Of Motorists.

This case implicates the rights of all motorists to remain free from arbitrary police interference, a right that is at the core of the Fourth Amendment. See *United States* v. *Ortiz*, 422 U.S. 891, 895 (1975). The gravity of this threat can only be understood when viewed in light of the massive numbers of traffic stops conducted each year. Data collection efforts regarding traffic stops are growing, but national data is not currently available. See U.S. Dep't of Justice, *Fact Sheet: Traffic Stop Data Collection Policies for State Police, 2001*,

(Dec. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tsdcp01.pdf. Missouri, however, has compiled and published statistics regarding traffic stops since early 2000. See Mo. Att'y Gen.'s Office, *2002 Annual Report Missouri Traffic Stops* (2003) ("*2002 Mo. Att'y Gen. Annual Rep.*"), *available at* http://www.ago.state.mo.us/racialprofiling/2002/racialprofiling2002.htm. The results of the Missouri study reveal that millions of traffic stops occur in that state each year, and that hundreds of thousands happen every day.[2] Thus, the rule adopted in this case will likely affect every motorist on America's streets and highways.

1. The vast majority of traffic stops involve law-abiding citizens, and result in, at most, a citation.[3] Allowing the police to conduct suspicionless dog-sniffs will inevitably result in prolonging the length and increasing the intrusiveness of seizures experienced by millions of motorists.[4] What is more, this practice is extremely unlikely to aid in stopping the flow of illegal narcotics, for traffic stops only rarely result in the interdiction of contraband.[5]

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[2] Missouri reported 1,369,185 traffic stops in 2002. *2002 Mo. Att'y Gen. Annual Rep.* tbl.1. That year the Missouri and United States populations were estimated to be 5,673,000 and 290,116,000. U.S. Census Bureau, *Statistical Abstract of the United States* tbls.3, 17 (2003), *available at* http://www.census.gov/prod/2004pubs/03statab/pop.pdf. If traffic stops are proportional to population, roughly 70 million traffic stops were made in the United States in 2002, or about 200,000 per day.

[3] For example, of Missouri's 1,369,185 traffic stops in 2002, approximately 93.2 percent did not result in arrest. *2002 Mo. Att'y Gen. Annual Rep.* tbl.1.

[4] Given 1,369,185 traffic stops, 108,539 searches and a 21 percent hit rate, *see infra* n.5, over 85,000 innocent motorists were stopped and searched in Missouri in a single year. *See 2002 Mo. Att'y Gen. Annual Rep.* tbl.1.

[5] In Missouri, eight percent of vehicles stopped in 2002 were searched. *Id.* Of that group, the hit rate for finding contraband was only 21 percent.

Suspicionless sniffs are thus both overbroad and not justified by law enforcement objectives.

Precisely the reverse is true of sniffs based on reasonable suspicion. The decision below limits the use of drug-detecting dogs to those situations where the police have objective suspicion of criminal (*i.e.*, narcotics) activity. This standard protects otherwise innocent motorists from the significant additional intrusion presented by the canine unit. At the same time, this standard serves to increase the ratio of "hits" to "sniffs," making the canine unit a more efficient weapon in the effort to curb narcotics trafficking.

In contrast, the rule sought by petitioner would eviscerate this protection and efficiency, by creating an extremely broad police entitlement. See *People* v. *Cox*, 782 N.E.2d 275, 281 (Ill. 2002) (permitting suspicionless sniffs would allow "police officers . . . to [use] canine units at every traffic stop"), *cert. denied*, 539 U.S. 937 (2003). Indeed, the behavior of the police in this case illustrates the extent to which law enforcement officials already believe they are entitled to use drug-dogs whenever they choose. Trooper Graham decided to respond with his dog immediately after Trooper Gillette notified dispatch of his intent to pull over respondent, *i.e.* before the stop was even completed. The presence of the canine unit was not requested by Officer Gillette, nor was there reason to believe that respondent was transporting contraband. Other cases reflect the same view. *E.g.*, *State* v. *Davalos*, 128 S.W.3d 143, 146 (Mo. Ct. App. 2004) (after issuing a citation for crossing the center line, police officer informed the driver that he was free to leave, but that his vehicle would be detained until a canine unit arrived because he seemed nervous); *State* v. *Fields*, 662 N.W.2d 242, 244 (N.D. 2003) (police officer summoned a canine unit to the scene of a traffic stop *after* issuing a

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Id. This means that less than two percent of the traffic stops in Missouri resulted in the seizure of contraband.

citation, saying good-bye and returning to his cruiser). These exercises of police authority cannot be reconciled with the Fourth Amendment.

The police may constitutionally stop any motorist who has violated even a technical traffic regulation, *Whren*, 517 U.S. at 819, choose to arrest the motorist, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), and even search the stopped car incident to that arrest, *Thornton*, 124 S. Ct. at 2129. Even these firmly established rules, however, should not be viewed as law enforcement entitlements. Rather they are exceptions to the warrant and probable cause requirements that are at the foundation of the Fourth Amendment. See *id.* at 2133 (O'Connor, J., concurring).

Where the police choose not to arrest, and instead decide to issue a citation, their power over the motorist is diminished. *E.g.*, *Knowles* v. *Iowa*, 525 U.S. 113 (1998) (suspicionless search of a car during a citation stop was unconstitutional even though the police could have conducted the same search had they arrested the driver). To be sure, a citation stop carries with it certain investigatory powers. The police officer may take reasonable precautions to assure his or her safety, or the safety of others at the scene. See *Mimms*, 434 U.S. at 111; *Maryland* v. *Wilson*, 519 U.S. 408, 415 (1997). The officer may examine the motorist's license and registration, check for outstanding warrants, and make inquiries about destination, travel plans, etc. See *United States* v. *Jones*, 269 F.3d 919, 924 (8th Cir. 2001). But this investigative authority is limited, and "[i]f no further suspicion is aroused in the officer following these inquiries, the traffic stop should go no further." *Cox*, 782 N.E.2d at 279. If the Fourth Amendment is to have any meaning, further intrusions should be justified by an objective suspicion. The law enforcement entitlement that would otherwise result presents too grave a threat of unbridled police discretion.

This sort of discretion vitiates the guarantees of the Fourth Amendment. *Brignoni-Ponce*, 422 U.S. at 882 ("the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion"); *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision . . . and leaves police discretion utterly without limits"). Limiting police discretion *at the stop* is critical, because the decision *to initiate the stop* will nearly always be insulated from review. A stop may be initiated whenever probable cause exists to suspect violation of any traffic law, regardless of the subjective motivation involved. *Whren*, 517 U.S. at 819. Such probable cause is a low hurdle: it is a rare driver who can avoid running afoul of the intricate web of traffic regulations. The police have nearly unfettered discretion to decide which cars should be stopped. They therefore should not have similar discretion to decide which car will be sniffed and which driver will be sent on unmolested. Such unfettered discretion would necessarily exacerbate the disparate treatment received by certain groups of drivers. The evidence of "racial profiling" is mounting. See generally U.S. Dep't of Justice, *Fact Sheet: Traffic Stop Data Collection, supra*; Racial Profiling Data Collection Res. Ctr., Northeastern Univ., Library and Archives, Data Collection Reports, *available at* http://www.racialprofilinganalysis.neu.edu (last visited Sep. 17, 2004) (collecting available data demonstrating the existence of racial profiling); see also *2002 Mo. Att'y Gen. Annual Rep.* § II (in 2002 "African Americans were stopped at a rate 32 percent higher than expected based solely on their proportion of the population" in Missouri). Controlling the discretion of the officer once the stop has been made may well be the most effective way to address this problem.

Unfettered police discretion to conduct a dog-sniff also vitiates the ability of a motorist to withhold consent to a

search. Police officers frequently call drug-dog units to the scene of a traffic stop, without any reason to suspect drug-related wrongdoing. They then offer to cancel the call if the driver consents to a search in the hope of returning to the road faster. *E.g.*, *State* v. *Nikolsky*, No. 3-926/02-1813, 2004 Iowa App. LEXIS 131, at *12 (Iowa Ct. App. Jan. 28, 2004) (police officer "told defendant that if he were in defendant's shoes, he would let officers search his car" to avoid the wait for the drug dog); see also *Palmer* v. *State*, 572 S.E.2d 27, 29 (Ga. Ct. App. 2002) (defendant consented to search after he was told that a canine unit would be summoned if he refused). Indeed, one jurisdiction has elevated this practice to standard operating procedure. See *United States* v. *Holloman*, 113 F.3d 192, 193 (11th Cir. 1997) (per curiam) (describing the St. Petersburg, Florida practice of stopping motorists and asking for consent, and where consent is refused, calling in a canine unit).

Obviously, this presents the very real possibility of coerced consent. Most motorists are predominantly concerned with returning to the road. Most motorists have committed no other offense than speeding, not having one's seatbelt on, or having a license plate light out. A rational driver might well consent to a search simply to avoid the additional delay of waiting for a dog-sniff. Indeed, at least one lower court declared that consent given in such a situation is meaningless. See *Rouse* v. *State*, 643 So. 2d 696, 698 (Fla. Dist. Ct. App. 1994). Prohibiting the suspicionless sniffs will do much to prevent the risk of involuntary consent. It would also provide both police and motorists with a bright line rule, avoiding difficult inquiries into the validity of consent and the line drawing problems inherent in deciding how much of a delay is acceptable. Cf. *New York* v. *Belton*, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.")

B. Requiring Reasonable Suspicion Will Reduce The Incidence Of False Positives And The Attendant Fourth Amendment Consequences.

Drug-detecting dogs are hardly infallible, and false-positive dog-sniffs are inevitable. *E.g.*, *Laime* v. *State*, 60 S.W.3d 464, 476 (Ark. 2001) (noting that a certified drug-dog had likely alerted in error between 10 and 50 times); *United States* v. *Scarborough*, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997) (describing a dog that alerted falsely four out of nineteen times); *United States* v. *Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (accepting as reliable a dog with a 62 percent accuracy record). Some of the erroneous positives are likely due to the unfortunate fact that nearly all U.S. currency has become contaminated by drug residue while in the hands of the Federal Reserve Bank. See *United States* v. *$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003) (noting that drug dogs will alert to approximately 80 percent of U.S. currency), *vacated on other grounds on grant of reh'g en banc*, 357 F.3d 1225 (11th Cir. 2004); *United States* v. *$506,231.00 in United States Currency*, 125 F.3d 442, 453 (7th Cir. 1997) (as much as 96 percent of U.S. currency is contaminated with cocaine); *Muhammed* v. *DEA, Asset Forfeiture Unit*, 92 F.3d 648, 653 (8th Cir. 1996) ("an extremely high percentage of all cash in circulation in America today is contaminated with drug-residue"); *United States* v. *$5,000 in U.S. Currency*, 40 F.3d 846, 849-50 (6th Cir. 1994) (a dog alert is of "minimal" value because as much as 97 percent of U.S. currency is "'thoroughly corrupted'" by cocaine residue). Regardless of the cause, however, it is an undeniable fact that drug-dogs will frequently alert to currency or other "dead scents."

False positives also abound in other circumstances. Drug-dogs have proven to be especially inaccurate in the school setting. See, *e.g.*, *Doe* v. *Renfrow*, 631 F.2d 91, 91-92 (7th Cir. 1980) (per curiam), and *id.* at 95 (Fairchild, J., dissenting) (out of 50 drug dog alerts during a day long sweep of a high school/junior high complex, 35 were in error—four

of the false alerts resulted in fruitless strip searches of students as young as 13); Ray Parker, *School board's drug-sniffing dog policy questioned*, Naples Daily News, July 5, 2004 (search of a high school senior's car after a drug-dog alert revealed no narcotics, but did reveal her mother's stun-gun, resulting in her expulsion). There is no reason to expect better performance at the side of a highway. Even the best drug-detecting dogs have been known to alert to food, other animals, and even subconscious (or deliberate) cues from their handlers. See generally, Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 424 (1997).

The significance of the false positive problem is exacerbated by the fact that a drug-dog alert is generally sufficient to serve as the basis for issuing a warrant, or where appropriate provide probable cause to conduct a warrantless search. See, *e.g.*, *United States* v. *Duffaut*, 314 F.3d 203, 208 (5th Cir. 2002); *United States* v. *Sundby*, 186 F.3d 873, 876 (8th Cir. 1999). A single false positive thus carries with it many other costs to innocent individuals and will result in further intrusions upon Fourth Amendment liberties. *E.g.*, *Renfrow*, 631 F.2d 92-93. Moreover, there is no remedy. A false positive will reveal no evidence, so the exclusionary rule cannot apply. At the same time, the doctrine of qualified immunity will bar most, if not all, civil suits. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). To be sure, law enforcement agencies have taken steps to minimize the risk of false positives. The dogs are specially bred. They receive extensive training, as do their handlers. Over the run of cases, however, even a near-perfect dog will cause a number of serious intrusions on the rights of innocent individuals.

A requirement of reasonable suspicion would greatly reduce the number and severity of false positives. If the police are entitled to use drug-dogs whenever and wherever they choose, then all motorists, regardless of the likelihood that they are involved in narcotics trafficking, are equally

likely to find themselves subjected to a dog-sniff. It is reasonable to assume that the percentage of drivers who actually are transporting drugs is very small. In these circumstances even a very accurate dog will falsely alert many times. See Bird, *supra*, at 430-31. Basic principles of conditional probability dictate, however, that if the likelihood of wrongdoing among the population sniffed is raised, the number of false positives will be reduced by an order of magnitude. See *id.* Thus, if the police only use dogs to sniff those for whom there already exists reasonable suspicion, that reduction can be realized.

C. Requiring Reasonable Suspicion Is Consistent With This Court's Prior Precedents.

Despite the broad nature of the law enforcement authority at stake here, and the attendant risks of involuntary consents and false positives, petitioner and its supporting *amici* argue that the Fourth Amendment intrusions caused by suspicionless dog-sniffs are *de minimis*. In support they point to three areas of this Court's Fourth Amendment jurisprudence. First, they argue that because a dog-sniff is not an independent *search* within the meaning of the Fourth Amendment, it cannot unreasonably expand a *seizure*. Pet Br. at 6-8; U.S. Br. at 10-11; Ark. Br. at 14. Second, they argue that dog-sniffs should be considered non-events for Fourth Amendment purposes, like questioning of suspects, or observations of items in plain-view. Pet Br. at 8-9; U.S. Br. at 18-19; Ark. Br. at 14-16. Finally, the United States also argues that privacy expectations in automobiles are so far reduced that motorists cannot have a reasonable expectation to not be exposed to dog-sniffs. U.S. Br. at 11-12. None of these arguments is persuasive, and each reflects an overly restrictive understanding of Fourth Amendment protections.

First, the dog-sniff precedents on which petitioner relies are inapposite. While a dog-sniff is not a search, *United States* v. *Place*, 462 U.S. 696, 707 (1983), the court below did not so hold. It held only that a suspicionless dog-sniff unreasonably

expands the scope of an otherwise lawful seizure. *Caballes*, 802 N.E.2d at 205. Similarly, the fact that a dog-sniff does not turn a checkpoint seizure into a search, *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40 (2000), says nothing about the reasonableness of the seizure in this case. The Illinois Supreme Court did not discuss this line of cases simply because they are not germane to its decision.

And, if it sanctions a suspicionless drug dog sniff on the side of the road, where does this Court draw the line as to how much time is reasonable for the dog to arrive? Five minutes, ten, twenty, thirty, an hour? The petitioner's and its *amici*'s argument flies in the face of a bright-line rule that is easy for the officer in the field to apply.

Second, the plain-view doctrine is even less applicable. This doctrine provides that the Fourth Amendment does not require police officers "to shield their eyes." *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Nor should they have to ignore their own sense of smell. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675 (1985) (DEA agent properly opened locked trailer after noting a strong smell of marijuana). But the significant difference between an officer's own sense of smell and that of a drug-dog cannot be ignored. But the distinction is constitutionally significant between, on the one hand, an officer's use of his or her "plain" senses in the brief exchanges attendant to a traffic stop and, on the other hand, an expansion of a seizure to encompass a dog sniff or other investigatory effort. The former does not expand the scope of the seizure. The latter does in that it fundamentally changes both the purpose and the method of the "look and see" during a traffic stop. A trained canine's sense of smell is many orders of magnitude more powerful than that of any police officer. See Bird, *supra*, at 408 (noting that olfactory prowess is proportional to the number of receptor cells an organism possesses and that a dog's receptor cells can "cover a space the area of the skin on the dog's body" while "the surface area of human olfactory cells would cover no more than a postage

stamp.") (citing Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 Hastings L.J. 15, 20-42 (1990)).

Moreover, the reason that plain-view observations, and similar police investigative methods, do not impermissibly expand a traffic stop is that they fall within a class of actions that are essentially non-events for the purposes of the Fourth Amendment. They are actions that the police may undertake at any time and against any person. Including dog-sniffs in this class would be unreasonable. The Fourth Amendment forbids the use of "unnecessarily frightening or offensive methods of . . . investigation." *Ortiz*, 422 U.S. at 895. Trained police canines are a particularly intimidating display of authority and their presence inevitably increases the embarrassment, offense and fright experienced by motorists. Moreover, analogizing dog-sniffs to questioning of suspects and observations made via plain-view would extend their use far beyond citation stops. The police would be able to conduct dog-sniffs of any property (or person) at any time and would be able to use this particularly frightening method of investigation without any showing of necessity.

The United States also emphasizes that there is a lowered expectation of privacy in automobiles. U.S. Br. at 11-12. While "[t]he Fourth Amendment does not treat a motorist's car as his castle," *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004), it still functions to protect motorists' rights during a citation stop. *Knowles*, 525 U.S. at 116-18. The government's understanding of the so-called automobile exception, however, would allow it to swallow the rule and would take an unduly "long step today toward 'balancing' into oblivion the protections [of] the Fourth Amendment." *Michigan* v. *Long*, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting).

The so-called "automobile exception" was first announced in *Carroll* v. *United States*, 267 U.S. 132 (1925), where this Court crafted an exception to the warrant requirement for

searches of automobiles in situations where law enforcement officers have probable cause to believe there is contraband in the car, *id.* at 153. Over the ensuing decades, the *Carroll* exception has been greatly expanded. Where probable cause exists, the police may search not only the car, but containers therein. *United States* v. *Ross*, 456 U.S. 798 (1982). This includes containers that belong to passengers or third-parties. *Wyoming* v. *Houghton*, 526 U.S. 295 (1999). The *Carroll* exception has spilled over to broaden other exceptions to the warrant requirement of the Fourth Amendment. For example, the right of the police to conduct a warrantless search of a person incident to an arrest has been extended to include the interior of a car, *Belton*, 453 U.S. at 460, whether or not the driver is arrested in the vehicle, *Thornton*, 124 S. Ct. at 2131. The United States would have the Court take the additional step of allowing suspicionless dog-sniffs at any traffic stop.

This additional step would be ill-advised and tragically ironic. The decision that first lowered the expectation of privacy in automobiles contained its own limitation:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Carroll, 267 U.S. at 153-54. Change "stop" to "detain" and "probable cause" to "reasonable suspicion" and add "unnecessary" before "interruption," and that is the holding below that should be affirmed.

To this day the police may not search a car for contraband absent probable cause or an arrest. A dog-sniff may not be a search, but it differs only in degree, not in kind. Because a

dog-sniff presents a lesser degree of intrusiveness than a search, probable cause is not required. Nevertheless, because a dog-sniff is more intrusive than a question or direct observation, some objective form of justification is needed, or the intolerable result foreshadowed in *Carroll* will have come to pass. The middle ground is the well-known requirement of reasonable suspicion that was originally announced in *Terry*.

D. Probable Cause To Make A Traffic Stop In No Way Justifies The Use Of Suspicionless Sniffs.

The traffic stop at issue here, like most, was based on probable cause. Petitioner and *amici* therefore insist that the presence of probable cause entitles the police to enlist the assistance of drug-detecting dogs, no matter the risk or the cost. Pet Br. at 12, 15; U.S. Br. at 16-17; Ark. Br. at 12-13. They contend that the reasonable relation requirement of *Terry* is inapplicable to probable cause traffic stops. Because probable cause is the "'gold standard'" of police justifications, a traffic stop supported by probable cause will be reasonable in nearly all circumstances. U.S. Br. at 17; Ark. Br. at 13. Thus, they contend that there is no need to balance the interests of the individual against those of society because the result is preordained. This argument makes a series of fatal errors.

1. The distinction between traffic stops supported by probable cause and those based on only reasonable suspicion is illusory at best—the latter category is largely empty. As the Florida Supreme Court once noted, traffic regulations are so comprehensive that "it is difficult to operate a vehicle without committing some trivial violation." *Kehoe* v. *State*, 521 So. 2d 1094, 1097 (Fla. 1988); see also *United States* v. *Sugar*, 322 F. Supp. 2d 85, 92 (D. Mass. 2004) (noting that a "30-something" driver who had seen the police cruiser and was consciously trying to avoid committing a traffic infraction could not avoid doing so). Indeed, perfect compliance with traffic regulations is so difficult that some officers have argued that the act of conforming to all

applicable regulations should itself give rise to reasonable suspicion. *E.g.*, *United States* v. *Smith*, 799 F.2d 704, 707 (11th Cir. 1986). It is no wonder that almost all traffic stops occur after the police allegedly witness a violation of one ordinance or another. Which, of course, means that nearly all traffic stops are supported by alleged probable cause; a question that becomes essentially beyond judicial review contrary to *Richards* v. *Wisconsin*, 520 U.S. 385, 393 (1997).

It follows that if Fourth Amendment balancing is inappropriate for probable cause traffic stops, the balancing approach is inappropriate for all traffic stops. .

2. This Court's vehicle stop cases preclude that conclusion. As an initial matter, the Court has twice noted that a citation stop "is a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'" *Knowles*, 525 U.S. at 117 (1998) (omission in original) (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984)); see also *Prouse*, 440 U.S. at 654 ("the purpose of [a citation stop] is limited and the resulting detention quite brief"). More importantly, this Court has had at least six opportunities to determine what forms of police conduct are reasonable during a citation stop. In each case the police had probable cause to believe that a traffic violation had occurred. And in each case the Court employed a balancing test.

In *Berkemer*, the Court addressed whether the *Miranda* warnings applied to questions asked during a routine traffic stop. The Court first noted that the *Miranda* warnings did not apply to *Terry* stops, because they were brief detentions that were "reasonably related in scope" to their original justification. *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984) (internal quotation marks omitted). In holding that the warnings did not apply to traffic stops either, the Court expressly relied on the "similarly noncoercive aspect of ordinary traffic stops." *Id.* at 440. The implication is clear—the reasonable relation requirement imposed by the Fourth

Amendment on both types of stops suffices to protect the Fifth Amendment interests of the detainees.

Petitioner, however, would rely on the Court's footnote in *Berkemer* that "[it did] not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Id.* at 439 n.29. Petitioner contends that this language indicates that there is no reasonable relation requirement for traffic stops, thereby foreclosing the result reached below. Pet. Br. at 15. This is clearly wrong. The Court's footnote simply indicates that a police officer's authority during a *Terry* stop is more limited than it is during a traffic stop. This is hardly controversial. For example, it is settled law that the police may demand to see the driver's license and registration during a traffic stop. No such authority exists during a *Terry* stop, although the police may ask questions about the individual's identity. See *Hiibel* v. *Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 2457 (2004) (upholding a statute requiring a *Terry* detainee to provide his name, but specifically noting that nothing requires the detainee to produce identification). This difference merely places a traffic stop somewhere between a true *Terry* stop and a custodial arrest, which is precisely what the Court meant when it said that a traffic stop was more analogous to the former. Nothing in the footnote or the differing levels of authority it described indicates that there is no requirement that a traffic stop supported by probable cause be reasonably related to its initial justification.

This understanding of the footnote is also compelled by the Court's decisions both before and after *Berkemer*. In *Mimms*, two police officers observed a motorist driving an automobile with expired license plates and pulled him over in order to issue a citation.[6] *Mimms*, 434 U.S. at 107. Once at the scene,

[6] Petitioner claims that *Mimms* involved only an investigatory stop and not a stop supported by probable cause. Pet. Br. at 14-15. This is clearly wrong, and for two reasons. First, the officers had observed a clear violation of the Pennsylvania traffic code. This is precisely the same level of justification that Trooper Gillette had when he stopped respondent, which the United States refers to as "a particularly clear form of probable cause." U.S. Br. at 14. Second, the Court subsequently and unambiguously indicated that *Mimms* was a traffic stop supported by probable cause. *See Wilson*, 519 U.S. at 414.

the officers ordered the driver out of the car. *Id.* In upholding the validity of that order, the Court held that the public interest at stake, officer safety, was of the highest importance and that the additional intrusion of the order was *de minimis* at most. *Id.* at 110-11. In other words, the Court used the *Terry* balancing test, the same test used below by the Supreme Court of Illinois.

More recently, in *Wilson*, the Court used the same balancing approach to extend the *Mimms* rule to the passengers of the stopped car. 519 U.S. at 411-14. The Court once again determined that the public interest in officer safety outweighed a *de minimis* intrusion on liberty. *Id.* at 414. The Court expressly noted that probable cause existed for the stop and proceeded to balance the relevant interests. *Id.*

In *Long*, 463 U.S. at 1035, two police deputies observed a car "travelling erratically and at excessive speed." They then witnessed the car swerve off the road and into a shallow ditch.[7] *Id.* During the course of the traffic investigation, the police saw a hunting knife in the car and decided to search the passenger compartment for weapons. *Id.* at 1036. The Court reasoned that the search of the car was permissible precisely because the police had objectively reasonable suspicion that there might be weapons. *Id.* at 1051. Thus, it was the presence of reasonable suspicion that justified going beyond

[7] While *Long* involved a single-car accident, and not a traffic stop, the officers there clearly had probable cause to believe a traffic violation had occurred. The Court acknowledged as much by noting that the officers could have arrested Long for speeding, but chose to issue a citation instead. 463 U.S. at 1035 n.1.

the scope of the initial encounter, not the fact that the police had probable cause to make an arrest.

In *United States* v. *Sharpe*, 470 U.S. 675 (1985), a DEA agent and a police officer witnessed two vehicles traveling more than 20 miles an hour over the speed limit. *Id.* at 677. While the Court noted that the DEA agent's decision to call in a state police officer was based on a desire to conduct an "'investigatory stop,'" *id.*, no seizure occurred until the law enforcement officials witnessed a much more serious violation of the traffic code than the minor infraction involved here. The Court explicitly followed *Terry* and determined that the resulting seizures were reasonably related to the purpose of the stop. *Id.* at 682-83. Thus, *Sharpe* is yet another instance where the Court found it proper to rest its holding on the principles of *Terry* despite the presence of probable cause.

Finally, in *Knowles*, just as here, a police officer observed a motorist speeding and made a traffic stop. 525 U.S. at 114. The Court explicitly noted the existence of probable cause. *Id.* at 116. The Court then balanced the "'legitimate and weighty'" public interests in officer safety and collecting evidence against the right to remain free from warrantless searches. *Id.* at 117. The Court concluded that a citation stop presents a much lesser safety threat than a custodial arrest. *Id.* More importantly, the Court noted that the state had no interest in collecting or preserving evidence of other crimes at a citation stop because "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." *Id.* at 118. The Court thus made clear that the state's interest in uncovering evidence of other crimes is not reasonably related to the probable cause that justified the traffic stop.

3. In arguing that a balancing approach is unnecessary, the United States relies primarily on *Whren* v. *United States*, 517 U.S. 806 (1996), where the Court held that a police officer's subjective intent is irrelevant when evaluating the

reasonableness of a traffic stop. This reliance is misplaced, for no one challenges the reasonableness of Trooper Gillette's decision to stop respondent. The only issue in this case is whether the subsequent dog-sniff rendered the otherwise permissible stop unreasonable. Not a single word in *Whren* addresses whether there are limits on what the police may do during a citation stop supported by probable cause. To be sure, the Court did hold that the fact that the stop was made by a plainclothes officer in an unmarked car did not render the stop unreasonable. *Id.* at 818. But this is best understood as approving the authority of the plainclothes officer to make the stop, for there was nothing unusual in the manner in which the stop was conducted.

Nevertheless, the government argues that *Whren* limited the situations in which a traffic stop based on probable cause could be unreasonable to situations involving the use of deadly force or the penetration of the body. U.S. Br. at 13. Certainly this proves too much. If the balancing approach is limited to such exceptional circumstances, the police will have carte blanche to conduct the seizure as they see fit, provided they do not conduct a full-field search. This is not a reasonable result, because it fails to ensure that the seizure properly balances the public and individual interests.

This reading of *Whren* also conflicts with the cases discussed above. In *Knowles*, *Wilson*, *Long*, *Mimms*, and *Berkemer* the Court adopted a balancing approach despite the existence of probable cause. The better reading of *Whren* is that there is no need to engage in a balancing test to determine whether a particular seizure was justified at its inception when it is supported by probable cause. The scope of the seizure remains subject to the Fourth Amendment's reasonableness requirement, however, which requires a balancing approach. Here the outcome is clear. The intimidation and embarrassment caused by a dog-sniff, as well as the unfettered discretion and risk of involuntary

consents, clearly outweigh the "remote" chance that the police will obtain evidence of other crimes.

CONCLUSION

For all these reasons, the decision of the Supreme Court of Illinois should be affirmed.

Respectfully Submitted.

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